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THE HUNGARIAN-RUMANIAN LAND DISPUTE

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A STUDY OF HUNGARIAN PROPERTY RIGHTS IN TRANSYLVANIA UNDER THE TREATY OF TRIANON

BY

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WITH AN INTRODUCTION BY

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TO MY PROFESSORS
AT HARVARD LAW SCHOOL WHO TAUGHT ME
THE TRUE MEANING OF LAW AND JUSTICE
THIS BOOK IS DEDICATED

INTRODUCTION

The most serious consequences of the great war were visited upon the Austro-Hungarian empire. Not only was the former Austria partitioned, certain territory being assigned to Czecho-Slovakia, Italy and Jugo-Slavia, but Hungary was carved up and much of it distributed between Serbia, Rumania, and Czecho-Slovakia, so that what was left to Hungary was but one third of her former domain. Whether Francis Joseph was the ally or the catspaw of William II, the dominions which on August 1, 1914, owed allegiance to the former, were treated by the victorious allied powers as spoils of war to be divided among the conquerors, while, apart from the restoration of Alsace-Lorraine to France, the German State in Europe remains virtually intact.

Few events in history present more poignant human problems than the enforced transfer of territory from one sovereignty to another. The plight of the occupants of lands thus assigned to former enemies, with whom they have been but lately engaged in war, well may excite the compassion of mankind. After the annexation of Alsace and Lorraine in 1870, many of the inhabitants of those provinces removed to France, rather than become subjects of the victorious Germans.

By the Treaty of Trianon, dated June 4, 1920, between the Allied Powers (including Rumania) and Hungary, the territory of the last-named state was greatly reduced by transferring portions of its domain to (1) the Kingdom of the Serbs, Croats and Slovenes, (2) Czecho-Slovakia, and (3) Rumania; provisions however were inserted securing to inhabitants of the transferred regions the right, within one year from the coming in force of the Treaty, to elect to retain their Hungarian nationality, and guaranteeing to them the right to their immovable property in the territory of their place of residence. Coupled with these provisions were others designed to protect these *optants* from sequestration or spoliation by the new government of the soil.

The Hungarian government had viewed with extreme apprehension the threatened confiscation of the lands of their nationals by Rumania, which, before the terms of the treaty were settled, had enacted laws purporting to expropriate all the real estate belonging to foreign nationals, and Hungary had expressed to the representatives of the Allied Powers the fear that the proposed treaty would not afford sufficient protection to their nationals against spoliation of their property by the Rumanian government, under the guise of "agrarian reform." Therefore the Hungarian government asked that all claims arising with respect to the restitution to Hungarian nationals of their property, rights and interests in the transferred territory might be arbitrated by the Mixed Arbitral Tribunal provided for in Article 239 of the Treaty. This was conceded and the Treaty was modified accordingly, before it was signed. Four days after the Treaty of Trianon became effective, the Rumanian land reform enactment, known as the "Garoflid Law," came into force. While this measure was so framed as, on superficial reading, to seem to apply alike to Rumanians and to foreigners, yet, it is claimed by Hungary, it actually discriminated against Hungarian optants and in effect confiscated their property rights in the transferred territory, precisely as the Hungarian government had apprehended. Mr. Deák in the following pages describes the efforts made since 1922 by the Hungarian government and the Hungarian optants to secure redress from the Rumanian government for the confiscation of their property. These efforts consisted, first, in an appeal to the Council of the League of Nations by Hungary under Article 11 of the League Covenant, and, next, in proceedings taken by the Hungarian optants before the Mixed Arbitral Tribunal, pursuant to Article 250 of the Treaty of Trianon. This Tribunal overruled Rumania's objections to its jurisdiction, whereupon the Rumanian arbitrator withdrew and that government declined to proceed. A request to the Council of the League of Nations, pursuant to the provisions of the Treaty, to nominate two nationals of neutral

countries, one of whom should be chosen as the third member of the Tribunal, is under consideraton by the Council. Very interesting and far-reaching questions are involved in this controversy, which has challenged the interest of students of international law in Europe and America and has occupied, on several occasions and for many days, the attention of the Council of the League of Nations and its members.

Mr. Deák is peculiarly qualified to prepare a clear and reliable account of this entire matter. A Hungarian by birth, scion of a line of distinguished scholars, he studied law and received his doctorate at the School of Law of the Royal Hungarian University of Budapest, after which he came to America and entered the Harvard Law School, where he was graduated S. J. D. in 1927. The material presented has been analyzed and subjected to the ruthless criticism which the Harvard system of legal study requires and the case is presented by Mr. Deák in a clear, logical manner, so that every candid student of the subject may reach his own conclusions. The subject is one of far greater importance than the mere question of what are the property rights of a few thousand landowners in Transylvania. It involves the enforceability of treaties; the protection of individuals against spoliation by a new and compulsory sovereignty; the enforceability of agreed arbitration, and compliance with the provisions of peace treaties in full performance not only of their letter but of their spirit.

Few questions have arisen in the Council of the League which have more sorely taxed the patience, the tact and the resourcefulness of its members. The writer has confidence that in the end the great principles of the sanctity of treaties and the enforceability of compulsory arbitration provided in them, will have received new and signal recognition in the great Parliament of Nations at Geneva.

GEORGE W. WICKERSHAM

New York, April, 1928

AUTHOR'S PREFACE

The material for this book was gathered in connection with a study made by the author as holder of a Pugsley Research Scholarship in International Law at the Harvard Law School under the direction of Professor Manley O. Hudson. The author's purpose is to present impartially those elements of fact and law which are involved in the dispute between Hungary and Rumania and which for several years have engaged the attention of international jurists. No attempt has been made to pass upon the merits of the controversy. Rather has the author endeavored to confine himself to those issues which are of general interest to the jurisprudential world. The study, therefore, involves only such matters as the interpretation of treaties, the relation between international law and national legislation, and the conflict between the political power exercised by the Council of the League of Nations and the judicial power of an arbitral tribunal operating under the terms of a treaty.

I wish to acknowledge gratefully the helpful assistance of Professor Manley O. Hudson and of Professor Eldon R. James, of the Harvard Law School. I also desire to express my appreciation to Miss Maurine N. Herrmann, Juris Doctor of the University of California, and member of the California State Bar, for her hearty coöperation in the realization of this work. This study would not have been possible had not the writer had her valuable assistance in reducing to concise thought a large mass of extremely complicated material. Finally, I wish to thank the Columbia University Press for the effort and care given to the publication of this book.

FRANCIS DEÁK

New York, April, 1928

CONTENTS

Chapter I

THE TREATY OF TRIANON AND THE RUMANIAN LAND REFORM LAWS

The Origin of the Dispute

The dispute between Hungary and Rumania arose with respect to expropriations instituted by the Rumanian government under the provisions of an agrarian reform law. This law underwent a series of changes, but under it in each of its varied forms, a great number of Hungarians lost their immovable property situated in Transylvania—a territory formerly part of the Kingdom of Hungary, but ceded to Rumania by the Treaty of Trianon.

The Hungarian government contends that the Rumanian land reform law is contrary to universally recognized principles of international law, and conflicts with certain provisions of the Treaty of Trianon which, in the estimation of Hungary, extended protection to the property of Hungarian nationals. The Rumanian government, on the other hand, asserts that the alleged protection of the treaty cannot impair the sovereignty of Rumania, in the exercise of which she may legislate in whatever way she pleases, with respect to property within her jurisdiction.

In order to understand the intricacies of the dispute, it will be necessary to inquire into the provisions of the Treaty of

Trianon and into the history of Rumanian legislation concerning the agrarian reform. Before doing so, however, it may be well to state a few facts about the distribution of landed property in Transylvania. This seems necessary in view of the persistent contention of Rumania that prior to the cession the peasants were landless and there were only vast feudal estates in Transylvania; that therefore the controversy arose and is conducted with vigor by the Hungarian government in the interest and on behalf of a small number of feudal landlords. There is no doubt that this assertion won for Rumania a favored position in the public opinion of many sections of Europe and of the world, and acquired for her the sympathy of many enlightened men. However, a study of the facts shows a distribution of landed property very different from that which the Rumanian government alleges.

According to the official data of the Hungarian Statistical Bureau and of the Ministry of Agriculture for the year 1916,[1] the total area of landed properties in Transylvania was 3,321,-994 hectares.[2] As to the distribution of this property, the following table will suffice:

Area of estates	*Number of owners*	*Total area*	*Percent*
Under 50 hectares.....	417,330	2,323,471	69.9
50–500 hectares.....	4,072	383,969	11.6
Over 500 hectares.....	343	360,097	10.8
Municipal property and compossessorates	622	254,457	7.7

It is perhaps of interest to carry this tabulation one step farther and discover more in detail the extent and the nature of the larger estates.

There were 275 private estates the areas of which varied from 1,000 to 5,000 cadastral acres. The acreage of these properties totaled 890.595. Of this, only 216,391 acres were arable land, the rest being pasture, forests, or waste lands.

[1] There was no substantial alteration in these figures prior to the enactment of the Rumanian agrarian land reform.

[2] One hectare is equal to 1.737 cadastral acres.

Twenty-one private estates boasted 5,000 to 10,000 cadastral acres. Of these, only two were rural estates, the other nineteen being timber lands.

Estates ranging from 10,000 to 20,000 cadastral acres were six in number. There were also six estates possessing over 20,000 cadastral acres. All twelve of these larger estates comprised solely forest and waste lands.[3]

These data seem to furnish a conclusive answer to the Rumanian contention, and we may proceed to investigate those provisions of the Treaty of Trianon which are supposed to extend a certain protection to the property of Hungarian nationals situated in the transferred territories.

The Armistice and the Occupation of Hungary

It should be remembered that at the conclusion of the Armistice between the Allied Powers and Austria-Hungary, on November 3, 1918, Rumania was already at peace with the latter, by virtue of the Treaty of Peace of Bucharest concluded between the Central Powers and Rumania on May 7, 1918.[4] Consequently, the Armistice Convention of November 3, 1918, did not even mention Rumania. It provided, in Article 3, for "the evacuation of all territory invaded by Austria-Hungary since the beginning of the war," and for the withdrawal of Austro-Hungarian forces beyond a line described in that article—a line taking into consideration Italian demands only.

Rumania re-entered the war on November 9, 1918; the reason given for this step was that Germany had violated the Treaty of Bucharest by increasing her troops in the Wallachia beyond the agreed strength.[5]

[3] Hungarian Peace Negotiations, published by the Royal Hungarian Ministry of Foreign Affairs, Budapest, 1921, Vol. 3 A, p. 348.

[4] Strupp, Karl, *Documents pour servir à l'histoire du droit des gens,* 2d ed., Vol. 3, Berlin, 1923, p. 134.

[5] Temperley, H. W. V., *A history of the Peace Conference of Paris,* London, 1921, Vol. 4, pp. 220-21.

The revolutionary government of Hungary concluded another Armistice with the Allied Powers at Belgrade on November 13, 1918. This convention provided, in Article I, that "The Hungarian government shall withdraw all troops, within eight days, north of a line drawn through the upper valley of the Szamos, Bistritz, Maros-Vásárhely, the river Maros to its junction with the Theiss, Maria-Theresiopel, Baja, Fünfkirchen (these places not being occupied by Hungarian troops), course of the Drave, until it coincides with the frontier of Slavonia-Croatia." [6]

The line thus defined cut about halfway through Transylvania along the Maros river—but this apparently did not satisfy the Rumanians. On the insistence of Rumania the Supreme Council of the Allied Powers, on March 19, 1919, extended the Rumanian occupation to the west, creating a neutral zone between the Hungarian and Rumanian troops, but including within the Rumanian lines the three cities of Arad, Nagy-Várad and Szatmár-Németi.[7] Colonel Vix, commander of the Allied Military Mission at Budapest, gave assurances to the Hungarian government that the new lines were of military occupation and had nothing to do with the definitive frontiers.

Two days later the Soviet government came into power in Budapest. During the disorder following the bolshevik revolution, Rumanian troops not only occupied the territory fixed by the Supreme Council on March 19; they stood, at the end of April, by the Theiss. Taking further advantage of Hungary's political upheaval, the Rumanian army, by the beginning of August, occupied Budapest and Hungary east of the Danube.

This occupation was not authorized by the Principal Allied and Associated Powers, and the Supreme Council immediately issued an order for the withdrawal of the Rumanian

[6] Temperley, *op. cit.*, Vol. 1, pp. 351 ff. and map.

[7] Hungarian Peace Negotiations, etc. (*supra*, note 3), Vol. 1, pp. 393-94. Note addressed by General Lobit, Commander of the Army in Hungary, to Count Károlyi, President of the Hungarian Republic.

army to the line of military occupation. Rumania disregarded the instructions of the Supreme Council for several months, and Hungary remained under occupation. The recalcitrance of the Rumanian government to the wishes of the Principal Allied Powers finally exhausted the patience of the Supreme Council. Early in December it addressed to Rumania the following ultimatum:

Paris, December 3, 1919

The Supreme Council has been obliged to examine anew the question of the relations between the Allies and Rumania which have been compromised by the difficulties brought forward for long months by the Rumanian Government in their reply to all demands of the Peace Conference relating to the observation of the general engagements which bind the Allies together. The point of departure of this situation was the refusal of Rumania to sign the treaty with Austria and the treaty guaranteeing the rights of minorities implied in the first signature.

On the other hand, since the commencement of the month of August, that is to say, since the moment when the Rumanian troops occupied Budapest, the Supreme Council has not ceased to request the Rumanian Government to assume in Hungary an attitude compatible with the common principle of the Allies. With an untiring patience inspired by the respect which the Allies have for each other and the hope that the Rumanian Government would eventually recognize that they cannot evade the reciprocal engagements of the Allies, the Conference has endeavored to maintain the bonds which unite the Allies to Rumania and to obtain the deference of that Government to the decisions of the Supreme Council. Pressing demands to this effect were addressed to the Government of Bucharest on August 4, 5, 6, 7, 14, 23, and 25, September 5, October 12, and November 3 and 7.

In order to show the importance attached to obtaining the reply of Rumania, the Conference went to the length of sending a special envoy, Sir George Clerk, to Bucharest.

So many patient efforts have only resulted in a reply conciliatory indeed in words, but negative in facts, to the three questions put—the acceptance of the frontiers fixed by the Supreme Council, the signature

of the Treaty of Peace with Austria and of the Treaty of Minorities, and the regularization of the situation in Hungary. The Rumanian Government has adjourned the first two questions and formulated a series of reserves which amounts to a refusal of the satisfaction demanded in the case of the third.

In presence of this attitude the Supreme Council decided to make a final appeal to the wisdom of the Rumanian Government and people, leaving to them the responsibility of the grave consequences which would result from a refusal or from an evasive reply. A term of eight days was fixed to receive the Rumanian reply. Taking note of the singular delay with which this telegram was transmitted to Bucharest, the conference fixed, as the starting point of the time allowed, the day on which the Council's telegram was in fact notified to the Rumanian Government, that is to say, Monday, November 24. This last delay expired at midday, December 2.

The Rumanian reply has not been such as the Supreme Council had the right to expect. Pleading the resignation of the Ministry and the recent assemblage of the new Parliament, the reply was limited to a request for a further delay in order that the new Government when constituted may undertake its responsibilities in agreement with the King and the Parliament. If the Supreme Council had adhered to their formal notifications, they would, faced with the inconclusive reply from Bucharest, have broken off relations with Rumania, since that Power, in spite of the incessant requests, has agreed to nothing for many months.

Nevertheless, desirous of manifesting in an incontestable manner their moderation and their extreme regret at the prospect of Rumania separating herself from her Allies, the Supreme Council has decided to grant a further and last delay of six days to Rumania. This delay will date from Tuesday, December 2, and will expire on Monday, December 8.

The Council hopes that so kindly an attitude will be appreciated at its due value at Bucharest by the new Government, whose decision will definitely determine the political orientation of Rumania, and will express either the respect or disdain of that Power for the decisions of the Peace Conference.[8]

At the same time the Supreme Council invited the Hun-

[8] Temperley, *op. cit.* (*supra*, note 5), Vol. 4, p. 517.

garian government to send its delegates to Paris for the conclusion of the Treaty of Peace.[9]

The ultimatum of the Supreme Council to Rumania had little practical effect. Upon the arrival of the Hungarian delegation in Paris, early in January, 1920, several communications were addressed by Hungary to the Peace Conference, the first among them being a note requesting the withdrawal of Rumanian troops behind the line of military occupation fixed by the Allied Powers. The Hungarian note reads as follows:

Neuilly, January 14, 1920

Sir,

The Hungarian Delegation to the Peace Conference asks leave to point out to the Allied and Associated Powers the peculiar situation in which it is placed by the obstinate resolve of Rumania not to withdraw her troops behind the line of demarcation as fixed by previous arrangements. Hungarian public opinion feels so strongly on this point that our Government had to declare that no peace-delegation would be sent to Paris before the aforementioned withdrawal should be effected. Still, having been made acquainted with the message sent to this effect to Rumania by the Allied Powers, unwilling to slacken the progress of the work of peace, the Hungarian Government sent us to Paris without further delay on the strength of that message, because it seemed impossible that such strong language as had been used by the Allied Powers should be disregarded by a country that owes everything to them. Unfortunately we have been mistaken in this most natural anticipation. The Rumanian troops are still on the Tisza river and the Rumanian Government seems bent on further resistance to the will of the Allied and Associated Powers.

We need not dwell on the manifold dangers resulting from this extraordinary situation; we need not mention the economic losses thereby inflicted on the unhappy people of the occupied districts, losses that will be severely felt in the food system of Central Europe; we need not point out the injury which many thousands of Hungarian citizens will suffer, by being deprived of a representation in the National Assembly at the time of its most vital discussions and decisions; what we insist

[9] Hungarian Peace Negotiations, etc. (*supra*, note 3), Vol. 1, p. 7.

upon is only the complication which arises from Rumania's obstinacy in our own work at the Peace Conference. Authoritatively we are made to understand that the terms of peace offered to Hungary will tax to the utmost our people's power of self-control but if so, it seems the more important that all secondary causes of irritation should be eliminated, none of which has such an exasperating effect on our national consciousness as the persistence of a foreign invasion not based on decisions of the Allied Powers, these being the only *force majeure* we can submit to without disgrace. Again we are told, by way of moral compensation, to expect the goodwill and loyal support of the Allied and Associated Powers in the work of national reconstruction which must follow the conclusion of a disastrous peace; but the soothing effect of such prospects is all but destroyed by the experience we have before our eyes of the inefficiency of the action taken by the Allied Powers towards Rumania.

It is our plain duty to state that the arduous and unpopular work of pacification which we have undertaken in perfect good faith is likely to be obstructed by unconquerable difficulties of national psychology if the Rumanian troops have not retired behind the line of demarcation before our National Assembly takes into consideration the terms of peace. It is a matter of urgency, then, that a tangible result should be obtained in this matter, a result which is after all but the fulfillment of the Allied Powers' will. Most respectfully but most decidedly we must insist on the necessity of speedily solving this complication, which threatens to frustrate all our efforts.

I remain, Sir, your obedient servant,

Apponyi[19]

It was after these preliminaries and under these circumstances that the conditions of the Peace Treaty were communicated to the Hungarian delegation. It seemed necessary to recall these historical facts in the light of which certain provisions of the treaty must be understood, and which should be borne in mind when considering the factors leading to the Hungarian-Rumanian dispute over the latter's agrarian reform.

[19] Hungarian Peace Negotiations, etc. (*supra*, note 3), Vol. 1, p. 2.

The Treaty of Trianon [11]

The Treaty of Trianon, in Articles 63 and 64, defines the right of persons losing their Hungarian nationality, to opt for the nationality of the state of which they had been citizens. It provides also that such optants are entitled to retain their immovable property situated in the ceded territory. Article 63 reads as follows:

> Persons over eighteen years of age losing their Hungarian nationality and obtaining *ipso facto* a new nationality under Article 61 shall be entitled within a period of one year from the coming into force of the present treaty to opt for the nationality of the State in which they possessed rights of citizenship before acquiring such rights in the territory transferred. . . .
>
> Persons who have exercised the above right to opt must within the succeeding twelve months transfer their place of residence to the State for which they have opted.
>
> They will be entitled to retain their immovable property in the territory of the other State where they had their place of residence before exercising their right to opt. . . .

It should be remarked that the interests of Hungarian optants are also emphatically safeguarded in the treaty concluded at Paris on December 9, 1919, between the Principal Allied and Associated Powers and Rumania.[12] Article 3, paragraph 3, of that treaty provides that "Persons who have exercised the above right to opt . . . will be entitled to retain their immovable property in Rumanian territory. . . ."

The intention of the Principal Allied and Associated Powers, when inserting this provision in the treaty concluded with Rumania, was undoubtedly to protect and preserve the property rights of Hungarian nationals. This is clearly shown in Article 1 of the treaty, which in the following terms binds Rumania to consider the provisions of the subsequent seven

[11] British and Foreign State Papers, Vol. 113, pp. 486 ff.
[12] *Ibid.*, Vol. 112, pp. 538 ff.

articles (hence also Article 3) as her fundamental laws, beyond the reach of her national legislation:

Rumania undertakes that the stipulations contained in Articles 2 to 8 of this Chapter shall be recognized as fundamental laws, and that no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them.

One further observation can be made regarding this treaty. The Preamble indicates that the obligations imposed on Rumania were regarded by the Principal Allied Powers as a consideration for the territorial acquisition accorded her by them. The Preamble reads as follows:

Whereas under treaties to which the Principal Allied and Associated Powers are parties, large accessions of territory are being and will be made to the Kingdom of Rumania, and

Whereas Rumania desires of her own free will to give full guarantee of liberty and justice to all inhabitants both of the old Kingdom of Rumania and of the territory added thereto, to whatever race, language, or religion they may belong. . . .

Hungarian citizens who fall not under the provisions of Articles 63 and 64 of the Treaty of Trianon but have property, rights and interests in the transferred territories were safeguarded by Article 250 of the treaty in the following terms:

Notwithstanding the provisions of Article 232 and the Annex to Section 4 the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.

Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration, taken since November 3, 1918, until the coming into force of the present treaty, in the condition in which they were before the application of the measures in question.

Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239. . . .

Article 232, under the operation of which Article 250 exempts the property rights and interests of Hungarian nationals, stipulates that, subject to any contrary stipulations in the treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property which belonged at the date of the coming into force of the treaty to nationals of the former Kingdom of Hungary and were within the territories of such powers, including the territories ceded to them by the treaty, or which were under the control of such Powers, and to apply the proceeds in payment to the nationals of the Allied and Associated Powers as compensation in respect of damage or injury inflicted upon them during the war. The claims made in this respect by such nationals are to be investigated and the total compensation determined by the Mixed Arbitral Tribunal provided for in Article 239, or by an arbitrator appointed by that tribunal. Stating this more simply, all of the property of Hungarian nationals which was found in the territory of any of the Allied and Associated Powers, including that part of the former territory of Hungary which by the treaty was ceded to the Succession States, was in effect confiscated and the owners were obliged to look to their own country for compensation.

It was this provision from which Article 250 exempted the property of Hungarian nationals in the transferred territory.

Article 250 of the Treaty of Trianon has its history, the knowledge of which is essential to an understanding of the controversy.

Article 49 of the original draft of the Treaty between the Allied Powers and Austria contained provisions similar to those of Article 297 of the Treaty of Versailles between the Allied Powers and Germany. This article provided that the

Allied and Associated Powers reserved the right to retain and liquidate the property, rights and interests of Austrian citizens within the territories transferred by the Treaty to the Succession States of the Austrian Empire. It also provided that Austria should compensate her citizens for such losses.

The Austrian peace delegation pointed out, in a note of June 23, 1919, that the position of Austria differed substantially from that of Germany. The German private property subject to retention and liquidation was comparatively little, compensation therefor only slightly depreciating Germany's national wealth. However, the majority of the properties of Austrian nationals was in territories about to be transferred to the Succession States. The Austrian note expressed the logical conclusion that mutilated Austria would be utterly incapable of compensating her citizens for confiscation on such a vast scale and stated that "no government would have either the right or power to subscribe to stipulations constituting so violent an impairment of the private rights of its citizens, an impairment without precedent in history." [13] The Austrian protest was heeded. By a note of July 8, 1919, the Allied Powers advised the Austrian delegation that Article 49 would be modified.[14] It was supplemented by Article 267, prohibiting the "retention and liquidation" of the property of Austrian nationals by the governments of the Succession States, and requiring the return of all that which had been sequestered, seized or controlled between November 1, 1918, and the coming into force of the treaty.

It was also made clear that the protection accorded to Austrian property situated in the Succession States was intended not only against measures which had then been taken, but also against any future measures which might be taken against such property. In the *letter d'envoi* of September 9,

[13] Bericht über die Tätigkeit der deutschösterreichischen Friedensdelegation in Saint-Germain-en-Laye, published by the Austrian government, Vol. 1, pp. 186-89.

[14] *Ibid.*, pp. 320-21.

1919, M. Clémenceau, the president of the Peace Conference, gave the following assurance to the Austrian delegation with respect to the application of Article 267 of the Treaty of Saint-Germain:

> The properties of Austrian citizens situated in territories ceded to the Allied Powers will be restored to their owners; these properties will be freed from all measures of liquidation or transfer taken since the armistice, and a similar exception from all measures of seizure or of liquidation is guaranteed for the future.[15]

Article 267 of the Treaty of St. Germain is identical with the first two paragraphs of Article 250 of the Treaty of Trianon. The third paragraph of Article 250, according to which "claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for in Article 239" was inserted following a note of the Hungarian delegation addressed to the Peace Conference.[16] Annex 6 to this note contained observations of the Hungarian delegation as to the original text of the treaty, and Article 250 was made the subject of special complaint. In view of the fact that at the time this note was presented expropriation in Transylvania was already in full swing under the first Rumanian decree-law of September 12, 1919,[17] the Hungarian delegation expressed the fear that Article 250 would not afford sufficient protection to Hungarian nationals against the loss of their property. The remarks concerning Article 250 stated:

> In terms of the Rumanian Edict (Article 2, paragraphs 1 and 2) sanctioned on September 10, 1919, all the real estate, situated in territories transferred from Hungary to Rumania which belongs to foreign nationals or such juridical persons whose residence (seat) or actual sphere of activity is situated outside Rumania, is subject to expropriation.
>
> Article 9 of the Act providing for the seizure of latifundia passed

[15] Ibid., Vol. 2, pp. 313-14.
[16] Hungarian Peace Negotiations, etc. (*supra*, note 3), Vol. 2, pp. 440 ff.
[17] See below, the history of the Rumanian agrarian legislation.

by the Czecho-Slovak State on June 16, 1919, ordains the establishment of a law in terms of which all the real estate of the nationals of enemy States shall be confiscated without payment of any compensation.

Both these laws are really measures against Hungarian nationals, for the latter possess very extensive estates in the territories to be transferred from us; and they may be included among those arbitrary measures by which the States receiving portions of our territory aim at practically dispossessing the Magyars.

And in any case it was evidently the intention of the Allied and Associated Powers, in drafting the provisions of the first paragraph of Article 250, to preclude the application of legal regulations similar to the laws in question; for these provisions stipulate that the property of our nationals situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with the provisions of Section 4 of Part 10. However, in view of the behavior towards the Magyars displayed by the neighboring occupying Powers during the period of occupation we have our doubts as to whether the provisions of Article 250 would afford adequate protection against those of the Rumanian law, which, while providing in general for the expropriation of the property of foreign nationals, is undoubtedly aimed first and foremost at Hungarian nationals and is evidently to be applied exclusively against the same.

Indeed, in our opinion, the provision of the first paragraph of Article 250 may be evaded by legal regulations which, while applying the dispositions thereof in principle to the nationals of the State establishing the said regulations also, will in practice be carried into effect only as against our nationals.

Consequently, in order to realize in fact the object which it is desired to attain by means of the first paragraph of Article 250, we request a reassuring declaration to the effect that the property of our nationals situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention, liquidation or expropriation in accordance with any legal regulation or concrete measure which is not applied under like conditions to the nationals of the State establishing the said legal regulation or executing the said measure.

Nor does the present article afford in other respects either an adequate protection to the lawful and equitable interests of our nationals which the Treaty of Peace would fain secure; for it does not contain

any adequate provision in respect of compensation for damages caused by illegal measures even for the event of the restitution in kind of sequestered property being no longer possible.

We therefore consider it necessary that, in the event of any dispute arising with respect to the presence of an obligation of restitution there should be the possibility of appeal to the Mixed Arbitral Tribunal to be established in terms of Section 6 of Part 10 and that the said Tribunal should be empowered to appoint the payment of compensation to the injured party, in the case of the interested Power failing to fulfill its obligation of surrender. It goes without saying that we too undertake to accept the decision of this Tribunal; therefore we request the insertion of the following provisions in a new article to follow Article 250.

Article . . .

All disputes arising in connection with the question of the obligation of restitution stipulated in the first paragraph of Article 249 and in Article 250, as well as all questions of damages connected therewith, shall be decided by the Mixed Arbitral Tribunal established in terms of Section 6.[18]

In the reply of the Allied and Associated Powers to the observations of the Hungarian delegation, transmitted on May 6, 1920, the following answer was given to the remarks and complaints raised in connection with Article 250:

The different observations presented by the Hungarian Delegation relative to the treatment accorded by Rumania and Czecho-Slovakia to immovable property constitutes a question of the interpretation of the Treaty of Peace not to be regulated at present.

The Allied Powers, however, have no objection to a recourse to the Mixed Tribunal proposed by the Hungarian Delegation for settling the conflicts relative to the restitution of their property, rights and interests situated in transferred territory to Hungarian nationals as provided by Article 250 of the treaty.

They accordingly agree to complete that article by the following words:

[18] Hungarian Peace Negotiations, etc. (*supra*, note 3), pp. 456-57.

"The claims which may be put forward by Hungarian nationals in virtue of the present article shall be arbitrated by the Mixed Arbitral Tribunal provided in Article 239." [19]

The provisions of Article 250, read in connection with Article 63, giving persons who otherwise would lose their Hungarian nationality under Article 61, the period of one year from the coming into force of the Treaty of Trianon, to opt for the nationality of the state in which they possessed rights of citizenship before acquiring such rights in the territory transferred, with a guaranty that "they will be entitled to retain their immovable property in the territory of the other state where they had their place of residence before exercising their right to opt," seem to be intended—at least in the estimation of the Hungarian government—to secure Hungarian nationals and optants the right to their property, freed from either the exceptional measure of liquidation for the purpose of paying war claims, "or from any other measure of transfer, compulsory administration or sequestration," taken between November 3, 1918, and the date of the coming into force of the treaty.

The view of the Hungarian government seems reasonable. Considering that Article 250 of the Treaty of Trianon is identical with Article 267 of the Treaty of Saint-Germain and that both were drafted by the same body in consideration of identical circumstances and with similar purposes in view, it is reasonable to suppose that the intended effects of these provisions should also be identical—that is to say, that the provision aimed to protect Hungarian property against seizure, liquidation or any other measure of this kind taken since the Armistice, and to guarantee such protection in the future as well.

The Rumanian Legislation Concerning Agrarian Reform

The history of events following the Armistice has shown that shortly after the conclusion of the Armistice, Rumanian

[19] *Ibid.*, p. 567.

troops occupied a part of Transylvania. While the first line of military occupation included only the eastern districts of Transylvania bordering on the Rumanian frontier, this line was subsequently pushed toward the heart of Hungary and all of Transylvania was brought, within a few months, under the military occupation and virtual domination of Rumania.

During this military occupation, even before the peace negotiations between the Allied Powers and Hungary were begun, the Rumanian Governing Council for Transylvania published a decree-law. This was in September, 1919. According to Article 2, paragraph *a,* of this law, immovable property of aliens was to be expropriated in its entirety regardless of whether the owners were aliens by origin or became such through any other fact, such as marriage or the exercise of the right of option.[20]

Meanwhile the peace negotiations in Paris had begun and the final text of the Treaty of Trianon, which was signed on June 4, 1920, was disclosed. It became evident that the above provision of the Rumanian decree-law was in palpable contradiction to the treaty. A second decree-law, published a few days after the signing of the treaty, amended Article 2 of the first decree-law and subjected its applications to the condition that "these provisions do not conflict with the stipulations in the Treaty of Peace concluded between the Allies and Austria-Hungary." [21]

[20] Monitorul Oficial, No. 117, September 12, 1919.

Article 2: "Now, therefore:

"1. The property herewith defined shall be expropriated:

"*a.* Immovable property belonging to subjects of foreign States, irrespective of the nature or extent of such property. Any person who has become the subject of a foreign State by reason of his descent or by marriage or in any other manner shall be regarded as the subject of a foreign State. All inhabitants in any part of Rumania who opt for the nationality of another State on the basis of a future law designed to regulate questions of citizenship must therefore be regarded as subjects of a foreign State."

[21] Monitorul Oficial, No. 55, June 12, 1920. "All immovable property shall be expropriated, irrespective of the nature or extent of the property, belonging to subjects of a foreign State. Any person who has become the subject of a foreign State by reason of his descent or by marriage or in any other manner

The Treaty of Trianon came into force on July 26, 1921. Four days later the Rumanian land reform law—"Agrarian Law applicable to Transylvania, the Banat, the districts of Crisana and the Maramuras," shortly called the Garoflid Law —was promulgated.[22] Although this law does not contain provisions palpably contrary to the Treaty of Trianon and the Treaty between the Allied Powers and Rumania, as did the two preceding laws, yet there are stipulations which, in the consideration of the Hungarian government, are objectionable. Three provisions of the Garoflid Law have been considered by Hungary as especially injurious to the rights of her nationals.

The first objection related to the definition of absenteeism. Article 6, paragraph *c*, of the Garoflid Law provides that the estates of absentees shall be subject to expropriation in their entirety, after which absenteeism is defined as follows:

> For the purposes of this law, an absentee shall be any person who was absent from the country from December 1, 1918, until the date when this law was placed on the table of the Parliament [23] unless such person was discharging official duties abroad. Rural estates not exceeding fifty jugars [24] shall be exempt from the operation of this law.

The second objection was to the method provided for by the law to compensate the owners of expropriated land. The fixing of the amount of compensation was to take place, according to Article 50 of the Garoflid Law, in the following manner:

> The price of land subject to expropriation by the operation of the present law is determined by cadastral jugars, by categories and by

shall be regarded as the subject of a foreign State. According to these provisions, all inhabitants of Rumania who opt for the nationality of another State on the basis of a future law designed to regulate questions of citizenship shall also be regarded as subjects of a foreign State provided that these provisions do not conflict with the stipulations in the Treaty of Peace concluded between the Allies and Austria-Hungary."

[22] Monitorul Oficial, No. 93, July 30, 1921.

[23] The law was introduced in the Rumanian Parliament on March 23, 1921.

[24] A jugar is equal to 1.473 acres.

classes of land. It is determined by any available means of assessment, such as the sale price of land in the community and district in 1913, the rent paid by farmers at the same period, being capitalized at 5 % values assessed by credit institutions, the net revenue per jugar, land taxes and other data relating to the land during the five years preceding 1913, but the price cannot in any case be higher than the price in 1913. The price shall be calculated in lei. For the fixing of the price the leu is considered as equal to the crown.

The third complaint was concerning the mode of payment. Article 85 of the law stipulates that

The payment of price due to the owner can be made in cash, or in bonds redeemable in fifty years, and bearing interest at 5%. The face value is considered on payment equal to the market value. For land expropriated under Articles 9-14, the price will be paid in cash.

The payment of compensation for all corporations shall be made in perpetual annuities bearing interest at 5%.

These three provisions of the Garoflid Law were responsible for the action taken by the Hungarian government to safeguard the interests of her nationals. We shall see below on what basis the Hungarian government attacked the Rumanian law and with what arguments Rumania sought to justify these provisions.

Expropriation for Absenteeism

Article 6, paragraph *c*, of the Garoflid Law was interpreted in a general executive decree issued in pursuance of the law, shortly after its promulgation. The decree provided that—

For the purposes of this law, an absentee shall be any person who was absent from the country from December 1, 1918, until the date on which the law was placed upon the table of the Parliament, unless such person was then discharging official duties abroad *or is a subject of a foreign State.*[25]

[25] Monitorul Oficial, No. 174, November 4, 1921. Italics are the author's.

This decree was issued by the government of Mr. Avaresco, the same government which introduced the agrarian law. It seems that the purpose of this construction of absenteeism, favorable to aliens, was to bring the Rumanian legislation into harmony with the provisions of the treaty.

A few months later, the government of Mr. Bratiano, which succeeded the Avaresco government, issued a second general executive decree, which in commenting on Article 6, paragraph *c*, merely reproduced the text of the law, word for word, making no reference to aliens.[26]

The final construction of absenteeism was brought about by three successive ordinances [27] issued immediately after the publication of the second general executive decree, to the authorities charged with the execution of the agrarian law. These ordinances instructed the executive bodies, concerning absenteeism, that no distinction should be made between Rumanian nationals and aliens. The second ordinance gave a particularly strict interpretation as to what should be understood by absenteeism:

> Seeing that the law requires continuous residence in the country during this period, you cannot accept any document designed to prove that the owner has passed at least a certain time there although he has not been there during the whole time. The only exception is when the owner has been entrusted with an official mission abroad and if he is able to prove that this mission has been entrusted to him by the government.

Thus, while the first executive decree excepted aliens from expropriation of their property for being absent from the

[26] Monitorul Oficial, No. 79, July 12, 1922.

[27] These ordinances were published by the Rumanian Minister of Agriculture under the dates of July 29, August 14, and August 21, 1922, and under numbers 15112, 16126, and 16451 respectively. These ordinances have not been published in the Monitorul Oficial. They may be found in the original Rumanian text and in French translation, as Annexes 8, 9, 10, 11, 12, and 13, of the Request by the Hungarian Government addressed to the League of Nations on March 15, 1923. See Recueil des actes et documents relatifs à l'affaire de l'expropriation par le royaume des biens immobiliers des optants hongrois, published by the Royal Hungarian Minister of Foreign Affairs, Budapest, 1924, pp. 19-22.

country from December 1, 1918, to March 23, 1921, the second executive decree and the subsequent ordinances suppressed this exemption.

The Conference of Ambassadors Addressed by Hungary

The Hungarian government, to protect the interests of her nationals, the land of an increasing number of whom was being expropriated, addressed a note on August 16, 1922, to the Conference of Ambassadors,[28] and requested that body "to enjoin the Rumanian government in order that she should conform her legislation and her attitude concerning the immovable property of persons who opted for Hungarian nationality, to the explicit dispositions of Article 63 of the Treaty of Trianon." To this request of the Hungarian government, the Conference of Ambassadors replied in a note dated August 31, 1922:

> The representations made by the Hungarian Government in its note relate entirely to the stipulations in the treaty between Rumania and the Principal Allied and Associated Powers regarding minorities and in accordance with that treaty should be submitted to the League of Nations. The Conference of Ambassadors has always held the view that it was not called upon to give a decision upon questions of this nature.[29]

It seems that the Conference of Ambassadors overlooked the fact that the measures complained of by the Hungarian government, if true, fell just as well within the scope of the Treaty of Trianon as within that of the Minorities Treaty.

Hungary brought the matter before the Conference of Ambassadors again, this time on the ground that Rumania was failing to execute the treaties. It was also pointed out in this second communication that an early solution of the question was a matter of supreme importance to Hungary. The

[28] The original text of this note is printed in Appendix I of this book.
[29] League of Nations Official Journal, Vol. 4, No. 7, p. 730.

Conference of Ambassadors replied in a note dated February 27, 1923, that the initiative in bringing this matter before the League of Nations should be taken by Hungary or by another member of the League.

Direct Negotiations between Hungary and Rumania

Ever since the introduction of the agrarian law, direct remonstrances have been made by Hungary to Rumania, but these have been unsuccessful. The Rumanian government steadily refused to reconsider the extension of expropriation for absenteeism to Hungarian nationals, and further efforts by Hungary to settle the controversy by direct negotiations were barred by a note of the Rumanian government,[30] the text of which reads as follows:

Bucharest,
February 28, 1923

Minister of Foreign Affairs

No. 11304

His Excellency,

Baron Rubido-Zichy,

Envoy Extraordinary and Minister Plenipotentiary of Hungary.

Monsieur le Ministre:

Referring to your notes, number 9083 of July 17, 302 of August 1, 14887 of September 12 and 18, and 16926 of October 11, of the year 1922, concerning the claims of diverse Hungarian subjects relative to immovable properties situate in Rumania which fall under the provisions of the agrarian law applicable to Transylvania, the Banat, the districts of the Crisana and the Maramures, I have the honor to inform you that I have examined these claims carefully. Unfortunately, it seems to me that I am unable to give satisfaction to the claims in view of the fact that the estates referred to have been expropriated in conformity with Article 6, paragraph *c*, of the said law.

The law decides in fact that the absentees shall be expropriated entirely without making any distinction between Rumanians and aliens.

[30] Translation is by the author. The original text may be found in Recueil, etc. (*supra*, note 27), p. 17.

There cannot be therefore any question of creating for the landholders of Hungarian origin in the recently annexed territories a privileged situation, not only as to other aliens, but also as to a whole class of Rumanian landowners.

Articles 63 and 250 of the Treaty of Trianon, to which you refer over and over again in your above cited note, cannot evidently have the effect of creating a similar state of affairs.

I beg you . . . etc.

For the Minister,
N. N. Filodor

Chapter II

THE DISPUTE BEFORE THE LEAGUE OF NATIONS AND THE BRUSSELS NEGOTIATIONS

The Request of Hungary to the Council of the League

Since the note of February 28, 1923, from the Rumanian Foreign Office closed the door to direct negotiations, the Hungarian government deemed it necessary to find an amicable adjustment through other channels. It addressed a request to the Council of the League of Nations on March 15, 1923.[31] This request was made on the one part in conformity with the advice expressed by the Conference of Ambassadors in its note of August 31, 1922,[32] and, on the other part under Article 11, paragraph 2, of the Covenant, which provides:

> It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

After summarizing the history of the agrarian reform in Transylvania, the request called attention to the legislative and administrative measures which, in the opinion of the Hungarian government, constitute an infringement upon those rights of her nationals which were guaranteed by the peace treaties. The extension of expropriation for absenteeism is alleged to be unmistakably directed against Hungarian nationals and optants. This, together with the provisions concern-

[31] League of Nations Official Journal, Vol. 4, No. 7, pp. 729-35, Request by the Hungarian Government to the Council of the League in accordance with Article 11 of the Covenant.

[32] *Supra*, note 29.

ing the method of fixing the amount of indemnity and the mode of payment, brought the Hungarian government to the conclusion that "expropriation on these lines differs very slightly from confiscation pure and simple." [33] The request concludes:

Consequently, the Royal Hungarian Government being desirous to establish peace and justice, turns in all confidence to the League of Nations, and has the honor to submit the following requests:

1. That the Council of the League of Nations should deal with the substance of the question at its next meeting, in view of the urgency of the matter, specially owing to the fact that a great number of persons of small means, including widows and orphans, who have fled from Transylvania and have in many cases been deprived of their sole source of subsistence by the measures in question, are anxiously awaiting the impartial decision of that body;

2. That the Council of the League of Nations should give a ruling on the substance of the questions, in the manner best suited to the circumstances, namely:

By declaring that the legislative and administrative enactments of the Kingdom of Rumania, to which reference has been made, are contrary to the treaties;

By ensuring, as regards the future, that the Legislature and the Government of Rumania should act in conformity with the provisions of the Treaties which have been invoked;

By ordering that the immovable property of persons opting in favor of Hungary, which has been affected by the confiscatory measures adopted in connection with the agrarian reform now being carried out in Rumania, should be restored to the parties entitled thereto in the condition in which it was before the application of the measures in question; also that it should in the future be maintained in that condition, free from all charges contrary to the provisions of the treaties, and that full compensation for damage should be given to the injured parties.

[33] *Ibid.*, p. 733.

The Council Meeting of April, 1923

The request of the Hungarian government was placed on the agenda of the twenty-fourth session of the Council, held in April, 1923.

The complaints of the Hungarian government were stated before the Council by Mr. Lukács, who was one of Hungary's two representatives.[34] He alleged that the Rumanian agrarian law was in conflict with international treaties which secured to those opting for Hungarian nationality the right to retain their landed property situated in the transferred territory. The imposition upon them of a penalty for absenteeism was, he declared, aggravated by the fact that, "in the majority of cases, the absence of those opting for Hungarian nationality had been compulsory." According to the statements of the Hungarian representative, 180,000 persons were obliged to leave the territory upon the advance of the Rumanian troops, and their return was rendered impossible by the Rumanian authorities. The result was that it was not only the owners of large estates, at whom the agrarian law was professedly aimed, who suffered by being absent, but also the small property holders, the widows and the orphans, on whom the penalty was visited—and these were the greatest sufferers. Hungary also denied the right of Rumania to enact a law having a retroactive effect on a territory over which she had no sovereignty prior to the coming into force of the Treaty of Trianon. Finally, Mr. Lukács called attention to another complaint in the Hungarian request concerning Article 19 of the recently adopted new Constitution of Rumania. This article provides that only Rumanians may acquire and retain landed property and that foreigners shall have a right only to an

[34] The other representative was Mr. Gajzágó. This was at the meeting of April 20, 1923. For the discussion before the Council, see League of Nations Official Journal, Vol. 4, No. 6, pp. 573-77, 604-11.

indemnity.[35] Mr. Lukács remarked that "The Hungarian government was protesting not against an agrarian reform carried out in good faith, but against confiscations which were unjust and contrary to the provisions of international treaties." For this reason, the Hungarian government filed this request and asked,

> That the Council of the League of Nations should declare that the measures taken by Rumania are contrary to the treaties, and that Rumania should take measures entirely in conformity with the stipulations of the international treaties, which have been invoked.
>
> That the Council should order that the immovable property of persons opting in favor of Hungary, confiscated as a measure of agrarian reform, should be restored to them, and that the persons opting in favor of Hungary, affected by this confiscatory measure, should be compensated for the damage which they have suffered, and should not in the future be inflicted with burdens contrary to the provisions of the international treaties.[36]

The charges brought by Hungary against Rumania were answered by M. Titulesco. He asserted that the agrarian reform in his country dated back as far as 1913; that the outbreak of the war prevented the immediate enforcement of this reform, but that, after the conclusion of the armistice, Rumania proceeded with the expropriation in the Old King-

[35] The project of a new Constitution was presented to the Rumanian Parliament on January 27, 1923. Article 19 of this project read as follows:

> Under no circumstance can any but Rumanians acquire and retain landed property in Rumania. Foreigners shall only be entitled to an indemnity.

This article became Article 18 of the final form of the Constitution promulgated on March 28, 1923, in the following words:

> Regardless of any claim whatsoever, only Rumanians and naturalized Rumanians can acquire and possess landed property in Rumania. Foreigners shall have a right only to the value of such property.

Author's translation. See official French text published by the Rumanian Foreign Office, Bucharest, 1923:

> Seuls les Roumains et ceux qui sont naturalisés Roumains peuvent acquérir à n'importe quel titre et posséder des immeubles ruraux en Roumanie. Les étrangers auront droit seulement à la valeur de ces immeubles.

[36] League of Nations Official Journal, Vol. 4, No. 6, p. 574.

dom as well as in the newly acquired provinces. Thus, he contended, the operation of an agrarian law in Transylvania was a part of a general scheme of expropriation and could not be regarded as directed at Hungarian nationals. As to the complaint concerning the construction of absenteeism, M. Titulesco answered that the provisions in regard to the absentees were not due to any hostility toward the Hungarians; that every landowner in Transylvania, whether Rumanian or foreign, absent between December 1, 1918, and March 23, 1921, had been entirely expropriated, and that there was perfect equality for all in that measure. He stated further that, while the provision regarding absenteeism might be arbitrary and might involve injustice to individuals, yet it was not less arbitrary and injurious than the provisions of the agrarian law in force in pre-war Rumania, under which there had been a total expropriation of all properties leased from 1910 to 1920; that the agrarian reform in Transylvania was more lenient than in the other parts of the Kingdom. Whereas in the Old Kingdom of Rumania the land of aliens was wholly expropriated, in Transylvania only the land of absentees was subject to expropriation. Whereas in the Old Kingdom the absentee was deprived of his land regardless of its area, the law applicable to Transylvania exempted property of less than fifty hectares.

As to the question of compensation, the same argument was applied, namely, that Rumanians and foreigners had been compensated equally, whatever the form and mode of the compensation may have been.

Thus, M. Titulesco concluded, the Hungarian government was seeking to establish not an equality of rights, but a privileged status in favor of Hungarian nationals in Transylvania; the treaties were interpreted as having created for persons opting Hungarian nationality a special kind of property, which could not be subject to national legislation. The Rumanian government, on the other hand, said M. Titulesco, interpreted the treaties to the effect that optants remained the owners of their property within the limits of the national laws

of a sovereign state. Characterizing the Hungarian interpretation as a demand for "a régime favoring Hungarian nationals at the expense of Rumanian landowners," he declared this to be impossible, and asked the Council not to reopen the question of expropriation, which had constituted the chief policy of the Rumanian government for the past ten years, but to refrain from intervention.

Answering the Rumanian representative, Mr. Gajzágó, of the Hungarian delegation, called to the attention of the Council a difference which existed between Transylvania and the Old Kingdom of Rumania, regarding the necessity of an agrarian reform. Hungary, he said, carried out an agrarian reform sixty years ago, and consequently the disproportion between large and small estates was far less in Transylvania than in Rumania, where no such reform had been effected. Nevertheless, declared the Hungarian representative, the agrarian law applied by Rumania to Transylvania was far more radical than that in force in the Old Kingdom of Rumania. He refuted M. Titulesco's contention that the law applied in Transylvania was more lenient, pointing out that, whereas the law in the Old Kingdom attached legal consequences to an absence of five years, the absence entailing similar legal consequences in Transylvania was fixed for the period between December 1, 1918 and March 23, 1921—during the greater part of which hostilities existed between the two countries; hostilities which forced Hungarians to flee, but which did not force Rumanians to do so.

Mr. Gajzágó repeated that the Hungarian government by no means interpreted paragraph 4 of Article 63 of the Treaty of Trianòn and the corresponding provision of the Treaty concluded between the Allied Powers and Rumania as constituting an absolute rule which does not admit even of an expropriation for reasons of public utility, including an agrarian reform. But he maintained that the law in its present form, with its provision as to absenteeism, was contrary to the treaties and that expropriation without full and ade-

quate compensation was confiscation. "If the expropriated landowners were not paid in full," said Mr. Gajzágó, "a grave prejudice would be caused to the principle of private property which was the basis of the entire social economy of Europe.[37]

This discussion between the two parties brought Mr. Adatci, the representative of Japan on the Council and Rapporteur of the case, to the conclusion that "the essential point at issue was the interpretation of the treaties," and he asked for the suspension of the discussion "to enable him to make a further study of the question."

At the Council Meeting of April 23, 1923, Mr. Adatci submitted the following concise report:

> At its meeting of April 20, the Council followed with close attention the statements made to it by the representatives of Hungary and Rumania regarding the Hungarian request to the League of Nations concerning the expropriation by Rumania of property belonging to persons who have opted for Hungarian nationality.
>
> The members of the Council were thereby enabled to realize the intricacies of the problem thus brought before them, a problem the solution of which calls for full and detailed examination of the texts of the various treaties and legislative provisions, and also of the manner in which they are executed.
>
> The case put forward by the Hungarian representative may be summarized as follows: In the legislative provisions dealing with agrarian reform in Transylvania, the Rumanian Government has not taken into account the provision embodied in Article 63 of the Treaty of Peace of Trianon (see also Article 3 of the Treaty of December 9, 1919, between the Principal Allied and Associated Powers and Rumania), under which persons who have opted for Hungarian nationality will be entitled to retain their immovable property in Rumanian territory. The Hungarian Government does not question the Rumanian Government's right to undertake, in general, measures of agrarian reform, but it is of opinion that certain provisions of the law go beyond the scope of any reform scheme which is consistent with Rumania's international obligations.
>
> The Rumanian representative explained that the programme of

[37] League of Nations Official Journal, Vol. 4, No. 6, p. 576.

agrarian reform in Rumania dated back to the pre-war period, and that, although the carrying-out of this reform may have proved exceedingly irksome to the parties concerned, the legislative provisions have always been designed to achieve a single object: social reform in accordance with the principle of absolute equality of treatment for all elements of the Rumanian population. The agrarian reform stipulations specially applicable in Transylvania are intended to meet the actual situation and are not directed against persons of Hungarian nationality who own lands in Transylvania more than against any other inhabitants. In the opinion of the Rumanian representative, the stipulations of the Rumanian law in question are in no way contrary to the stipulations of the treaties.

Two opposite legal arguments are accordingly before the Council, and the settlement of the dispute will depend upon the interpretation of the treaties and on the legal examination of the Rumanian legislative stipulations in question.

Having regard to these considerations, I am of opinion that the most satisfactory method of reaching a solution would be for the parties themselves to submit the dispute to the legal authority set up in accordance with the Covenant of the League of Nations: the Permanent Court of International Justice.

The special agreement required for this purpose would have to be drawn up at a meeting of the Council in conjunction with the two parties concerned.

I have taken the liberty of preparing a preliminary draft which might serve as a basis for the agreement to which I have referred. It is of course, understood that the interest of the land-owners in question should in no way be prejudiced during the period following the reference of the question to the Court, and I believe that the Council will share my view and recommend that the Rumanian Government should refrain from taking any action and should suspend all proceedings in connection with this matter.

I beg to propose that the Council should adopt the following resolution:

"The Council recommends the two parties, under the guidance of the Rapporteur, to open negotiations forthwith for the purpose of signing a special agreement on the basis of the draft annexed to this report." [38]

[38] League of Nations Official Journal, Vol. 4, No. 6, pp. 604-5.

Together with the report, Mr. Adatci submitted the draft of an agreement by virtue of which Hungary and Rumania would refer their dispute for a decision to the Permanent Court of International Justice.[39]

[39] League of Nations Official Journal, Vol. 4, No. 6, pp. 703-4, "Draft agreement between Hungary and Rumania . . ." (referring to the Permanent Court of International Justice the question of the expropriation of property in Rumania of persons who have opted for Hungarian nationality):

"The Royal Hungarian Government and the Royal Rumanian Government, being desirous of settling amicably, in accordance with the recommendations made by the Council of the League of Nations on . . . 1923, the dispute between the two Governments regarding the application of the agrarian law at present in force in Transylvania, the Banat and the districts of the Crisana and the Maramures, which was promulgated by the Rumanian Government on July 30, 1921, have authorized the undersigned to accept the special agreement, the terms of which are as follows:

"Article 1.

"The Permanent Court of International Justice will be requested to decide the following question:

"Whereas the Rumanian authorities have, in execution of the Rumanian agrarian reform law, dated July 30, 1921, which was promulgated and enforced in Transylvania, the Banat, and the districts of the Crisana and the Maramures, expropriated property belonging to persons who formerly had their rights of citizenship (*pertinenza*) within the territory transferred to the Kingdom of Rumania in pursuance of the Treaty of Peace of Trianon, but who subsequently opted for Hungarian nationality, either in accordance with the Articles 63 and 64 of that treaty or in accordance with Article 3 of the treaty known as the Minorities Treaty (signed at Paris on December 9, 1919, between the Principal Allied and Associated Powers and Rumania), does, or does not, this expropriation constitute a violation either of Article 63 of the Treaty of Trianon or of Article 3 of the Minorities Treaty?

"Article 2.

"Should the Permanent Court of International Justice decide that the above-mentioned law cannot apply to the property in question, the Court will further determine what measures should be taken by the Rumanian Government to indemnify Hungarian nationals whose interests have been prejudiced by any application of this law which may be inconsistent either with Article 63 of the Treaty of Peace of Trianon or with Article 3 of the Minorities Treaty.

"Article 3.

"The two Governments will mutually agree to submit the question set forth in Articles 1 and 2 above to the Permanent Court not later than . . . . .

The Hungarian representatives accepted the report and the proposal of Mr. Adatci. In accepting, Mr. Lukács said:

> In view of the fact that the question concerns a case of interpretation of treaties and of a purely legal question, and since the Council of the League does not seem able to decide to solve the question, it is both in conformity with equity and with the letter and spirit of the Covenant that the question should be submitted for decision to the Permanent Court of International Justice, which is the supreme international tribunal and the guardian of the rights of the peoples. On behalf of my Government, I am ready to sign the compromise proposed by His Excellency the Japanese Ambassador, and I hope that the representative of Rumania will do the same . . .[40]

He further asked that Rumania be requested by the Council to suspend any further action in carrying out the agrarian law until a decision of the Court had been rendered—a procedure which had been adopted by the Conference of Ambassadors and by the Council in the case of the expropriation of German nationals in Poland.

The proposal to submit the dispute to the Permanent Court of International Justice was rejected by Rumania. The Ru-

> "In accordance with Article 35 of the Rules of the Court, each party will state in the document notifying the Court of the special agreement the address selected by it at the seat of the Court to which all notices and communications are to be sent.
>
> "Article 4.
>
> "The proceedings before the Court will be conducted in French.
>
> "Article 5.
>
> "The proceedings before the Court will be governed by the Statute and the Rules of the Court.
>
> "Article 6.
>
> "The Secretariat of the League of Nations will be responsible for registering this special agreement.
>
> "Executed at Geneva on . . . . . one thousand nine hundred and twenty-three, in three copies, one of which will be deposited with the Secretariat of the League of Nations."

[40] League of Nations Official Journal, Vol. 4, No. 6, p. 605.

manian government took the ground that there was something more than a controversy upon a point of law, and that the Hungarian demands brought into issue not only a question of the interpretation of a text, but also "the political and social transformation of a nation." Another reason given by Rumania for refusing the proposal was that, admitting a violation of international obligations by the agrarian law, this violation resulted not from an act of the government but from a fundamental law of the Constitution; the acceptance of the proposal would therefore mean "to submit the Constitution of Rumania to the arbitration of a third party."

Mr. Adatci then suggested that, as Rumania refused to submit the dispute to the Permanent Court of International Justice, the Council should ask for an advisory opinion from the Court, "it being understood that the Council's freedom of decision would be in no way limited." Mr. Lukács, on behalf of the Hungarian government, declared his adherence to this modified proposal. M. Titulesco, on the other hand, held this procedure even less acceptable from the point of view of the Rumanian government than the first one. In case of a final decision of the Court, the question would, at least, be closed; in the case of an advisory opinion, the merits of the problem would remain open. Adverting to the fact that the Hungarian request was made under Article 11, paragraph 2, of the Covenant, which provides for calling the attention of the Council to any circumstance which might endanger peace, M. Titulesco declared: 'I also can invoke Article 11, paragraph 2, of the Covenant and say that the Hungarian request as formulated and the fact that there is a delay in finding a solution are greater menaces to peace because they might excite passions and create feeling in millions of Rumanian subjects regarding patrimonial interests which are submitted to an international tribunal, which is incapable of judging them." [41] He was of the opinion that the League of Nations was not in any way competent to settle the legal question.

[41] League of Nations Official Journal, Vol. 4, No. 6, p. 608.

The submission of it to the Permanent Court of International Justice, on the other hand, would cause social disturbances in Rumania due to the fact that it would reopen the question of expropriation and would cast doubt on the rights of those peasants who profited by the expropriation.

When it became evident that the two parties were unable to reach an agreement upon the suggestions of Mr. Adatci, the President of the Council (the Honorable Edward Wood [now Lord Irwin], representing the British Empire) submitted the following resolution:

1. The Council decides to postpone to its next session further discussion concerning the Hungarian request relating to the expropriation by Rumania of the immovable properties of Hungarian optants.

2. The Council invites the representative of Japan, as Rapporteur, to continue the examination of the question and to submit to the Council a general report on the subject before the next session.

3. The Council invites the Government of Hungary and the Government of Rumania to forward to the Rapporteur as soon as possible all documents and such further information as they may deem necessary in order to enable him to make his report, and give him at his request all necessary explanations.

4. The Council invites the Rumanian Government to abstain from any action, and to suspend any steps of procedure which might prejudice the definitive solution of this matter.[42]

The Rumanian representative opposed this resolution point by point. He opposed the postponement of a decision, as it would leave the whole problem an open question. As to the second point, he asked that the report should be made in accordance with Article 15, paragraph 4, of the Covenant, which provides that, if a solution cannot be found, the Council shall simply take note of the fact and publish its report. M. Titulesco pronounced useless paragraph 3 of the draft resolution asking fresh information, as there would be no further facts at the next session than there had been at the present

[42] League of Nations Official Journal, Vol. 4, No. 6, p. 609.

session. Finally, he refused to accept point 4, requesting the suspension of the agrarian law pending the decision of the Council.

The Hungarian representatives, on the contrary, while expressing regret that the question was neither settled by the Council nor referred for a decision or for an advisory opinion to the Permanent Court of International Justice, submitted that Hungary "did not wish to oppose a reasonable solution, whatever it might be"; and they accepted the proposal that "the settlement of the dispute should be deferred until the next session of the Council and that the question should in the meantime be submitted to examination." They stated, however, that without paragraph 4, the draft-resolution was not acceptable to Hungary.

After further discussion, in which M. Hanotaux (France) and M. Salandra (Italy) took part, the President of the Council proposed a new resolution in the following terms:

> The Council, having heard the discussion relative to this question, regrets that it sees no present prospect of agreement, and is therefore unable to make any suggestion which would lead to its immediate solution.
>
> It accordingly remits the question for further consideration at the next session of the Council, expresses the hope that M. Adatci will continue to act as Rapporteur, and in the meantime trusts that the Governments of Hungary and Rumania will direct their best efforts towards the attainment of an agreed solution.[43]

This resolution was adopted.

The Brussels Conversations [44]

In conformity with the resolution of the Council, adopted at its meeting of April 23, 1923, Mr. Adatci invited Hungary

[43] League of Nations Official Journal, Vol. 4, No. 6, pp. 609-11.

[44] The minutes of the Brussels Conversations were attached to the report of Mr. Adatci submitted to the Council on July 5, 1923. They are fully printed in Appendix II.

and Rumania to negotiate concerning the issue at Brussels. The delegates from the two governments met at Brussels on May 26. Hungary sent as its first representative, Count Csáky, and as its second representative, Mr. Gajzágó. Rumania was again represented by M. Titulesco. In addition, several members of the League of Nations Secretariat were present.

The conversations took up, according to the minutes, five points raised by the Hungarian request of March 15, 1923.[45] These five points were the following:

1. The discrepancy between the Rumanian agrarian law and the provisions of the Treaty of Trianon declaring the right of Hungarian optants to keep their immovable property situated in territory ceded to Rumania.
2. The aggravation of the wrong caused to Hungarian optants, in consequence of the provisions regarding absenteeism laid down in the Rumanian law in force in Transylvania.
3. The question of the amount of compensation.
4. The provisions of Article 18 of the Rumanian Constitution forbidding aliens to own land in Rumania.
5. Various other provisions, covered by that part of the Hungarian request which reads, "There are doubtless a number of other provisions of the Rumanian agrarian law which injuriously affect the rights of Hungarians who exercise their right to opt," and in support of which the Hungarian delegates brought forward several complaints against certain provisions of the agrarian law.

These five points were discussed at length by the delegates of the countries in conflict.

Concerning the first point, the minutes report that,

> As regards the question of the discrepancy between Rumanian law and the provisions of the Treaty which deal with the rights of Hungarian optants, it is admitted—and the Hungarian representatives do not dis-

[45] *Supra,* note 31.

pute the point—that the Treaty does not preclude the expropriation of the property of optants for reasons of public welfare, including the social requirements of agrarian reform.

On the second point, the question of absenteeism, no agreement could be reached. The minutes simply register the points of view of the Hungarian and the Rumanian representatives, respectively. The Hungarian representatives asserted that the disqualification of absentees affected particularly and was directed at Hungarian nationals. The Rumanian representative, on the other hand, asserted that the law was truly impartial and that if individuals were hit by this provision unjustly, such persons "would be accorded full justice within the limits of the Rumanian law and of cases which had already been definitely settled."

No settlement could be brought about on the third point, the question of compensation. As the *compte-rendu* states,

> The two representatives considered it inadvisable to continue the discussion on the question of the redemption price; no compromise appeared possible between their respective points of view, because the Hungarian representatives considered the amount of compensation too small, and asked that the value of expropriated lands should be allowed for, while the Rumanian representative contended that Hungarian optants could not be granted greater compensation than that accorded to Rumanian subjects.

Article 18 of the Rumanian Constitution was eliminated from the discussion by the intimation of the Rumanian delegate that "subject to the results of the negotiations, he was considering the possibility of making certain statements to the Council on this point."

Concerning the last point, complaining of other provisions of the agrarian law which injuriously affect the right of optants, the negotiators came to the conclusion that these various points would have to be presented anew if it was considered necessary to bring them before the Council, as they had not been included in the original Hungarian request.

After the conclusion of these conversations, a resolution was drafted by Mr. Adatci which he proposed to submit to the Council at its next meeting. One paragraph of this draft was initialed by Mr. Adatci, M. Titulesco, and Count Csáky. A few days later, the Hungarian government deemed it necessary to disavow its first representative. The Hungarian Minister of Foreign Affairs, on June 12, 1923, addressed the following letter to Mr. Adatci:[46]

Mr. Ambassador:

I have the honor to forward herewith to Your Excellency a memorandum which contains the point of view of the Royal Hungarian Government concerning the negotiations conducted at Brussels by its representatives in the affair of expropriation by the Rumanian Government of the immovable property belonging to Hungarian optants.

I cannot refrain from expressing my greatest regret about the failure of these negotiations and must inform Your Excellency that, in view of the vital importance of the affair of the optants, also from the point of view of the protection of minorities, a most important question for central Europe, no Hungarian government could adhere in this affair to a resolution of the League of Nations which evades a solution of the problem.

Considering the importance of this affair, the Royal Hungarian Government charged His Excellency, Mr. Coloman de Kánya, envoy extraordinary and minister plenipotentiary, director in chief of the Ministry of Foreign Affairs, to give Your Excellency personally the reasons for the attitude which it thinks it necessary to take. He will furnish Your Excellency all information which you will judge necessary.

Daruváry

Two days later, Mr. Kánya transmitted this letter, with the memorandum mentioned, to Mr. Adatci, at Geneva, where the Japanese Ambassador sojourned at that time. The memorandum averred: first, that the full power given to the nego-

[46] Author's translation. This letter with its Annexes has not been published in the Official Journal of the League of Nations. It is printed in the Recueil, etc. (*supra,* note 27), pp. 61 ff.

tiators authorized only direct negotiations with Rumania; second, that the Hungarian government was not in a position to delegate full powers to its negotiators embracing also the possibility of the preparation of the report of the Rapporteur, due to the fact that the Hungarian government had not been advised concerning such a contingency; third, that the Hungarian government was of the opinion that the preparation of the report of the Rapporteur could not be the task of its negotiators and consequently it had not given them full powers to that effect; and fourth, that the representatives of the Hungarian government pointed out several times during the negotiations that they lacked all powers and instructions concerning the preparation of such a report. "It is therefore evident," continues the memorandum, "that the said delegate of the Royal Hungarian government overstepped the bounds of his powers and the Royal Hungarian government with great regret is unable to adhere to the draft of the resolution in spite of the writing of the initials of one of its representatives under one part of the text. It can do so the less in view of the fact that the draft-resolution in question does not at all solve the merits of the problem but leaves the juristic question open as the draft of the report expressly states.

"This draft-resolution suggests no solution whatsoever to the affair; it contains only advice of a political character which remains outside the scope of the issue.

"Hungary expects a solution on the merits, first as of right, and second by virtue of Article 11 of the Covenant which considers the good understanding between the parties; for this good understanding can be reëstablished, not by leaving the problem undecided, but solely by solving the dispute with all the guarantees of justice and with all assurances contained in a judicial solution."

For these reasons, the Hungarian memorandum concluded by requesting Mr. Adatci to suggest to the Council the solution he proposed at the last meeting in April, 1923, as the only just one, namely, the reference of the dispute to the

Permanent Court of International Justice for a decision or for an advisory opinion.[47]

The memorandum of the Hungarian government, disavowing Count Csáky, and the answer of Mr. Adatci, also drafted in the form of a memorandum, were communicated to the members of the Council by the Secretary-General.[48] Mr. Adatci in his memorandum contested the point of view expressed in the Hungarian memorandum, that the Brussels negotiations had failed; it was his earnest conviction that the conversations "brought about certain results which might contribute to the solution of the differences pending between the two countries." He expressed surprise at the Hungarian government's refusal to ratify the action of its delegate; the conciliatory activity of the League's Council would be made impossible, he said, if the duly authorized negotiators of the parties could later, "contrary to all international usage," be disavowed by their governments. The representatives of the two parties "came in common accord to certain conclusions on several points forming the basis of the Hungarian request," and these conclusions he would, he declared, communicate to the Council as "positive results." As to the Hungarian request that the dispute should be referred to the Permanent Court of International Justice, Mr. Adatci remarked that he had suggested this procedure at the previous session of the Council, but that, "to his great regret and in spite of his insistence, it was impossible to obtain the adherence of the Rumanian government to this proposal." Under these circumstances it seemed futile to make this proposal again, as there was no chance that it would be accepted. The memorandum concludes with an appeal to the Hungarian government to contribute to an amicable adjustment of the dispute.[49]

No doubt, the appearance of the initials of Count Csáky in the draft-resolution of Mr. Adatci furnished an opportunity

[47] See the full text of the memorandum in Appendix III.
[48] Docum. C. 404. 1923. VII. Note of the Secretary-General of June 19, 1923.
[49] Mr. Adatci's memorandum bears no date. See the full text in Appendix IV.

still further to confuse and complicate the issue, to the disadvantage of Hungary. Despite the fact that the minutes of the Brussels Conversations remained unsigned, and that only one paragraph of Mr. Adatci's draft-resolution was initialed, the Rumanian government has ever since contended that the dispute over the agrarian reform in Transylvania was definitely settled at Brussels, and that the record of the conversations, incorporated in the report of Mr. Adatci, constituted a binding agreement. Whether this record can properly be called an "agreement"; whether, if it can, Hungary's prompt refusal to approve it rendered it ineffective; whether Hungary's disavowal of the act of her representative was contrary to international usage—these are questions which will be considered in connection with the arguments pro and con brought forward during the discussions before the Council, and later before the Rumanian-Hungarian Mixed Arbitral Tribunal.

The Brussels Conversations before the Council

The Rumanian-Hungarian dispute was put on the agenda of the twenty-fifth session of the Council, and the record of the Brussels conversations, together with the report of Mr. Adatci, was submitted to the meeting of July 5, 1923. Mr. Adatci, before submitting his report, made a long statement with regard to the situation created by the disavowal by the Hungarian government of its delegate; he also referred to an additional memorandum submitted by Hungary to the Council, containing supplementary statements upon point 5 of the Brussels conversations—"Other provisions of the agrarian law which injuriously affect the rights of optants." [50] A number of the arguments contained in the additional memorandum were, said Mr. Adatci, familiar to the members of the Council; it was his object merely to call attention to those

[50] This additional memorandum, dated June 19, 1923, was never published in the Official Journal. It was circulated among the Members of the Council as Docum. C. 438. 1923. VII. 1 by the Secretary General. For the text and annexes, see Recueil, etc. (*supra*, note 27), pp. 68-102.

which seemed to raise new points in the discussion—points which had occurred since the Brussels negotiations. In concluding, the Japanese representative asked that the members of the Council "regard his report and the draft resolution which forms the conclusion of that report as the basis of their present discussion." [51]

The report of Mr. Adatci reads as follows:

In its resolution dated April 23, 1923, the Council instructed its Rapporteur to prepare material for a fresh discussion of the question of the Hungarian optants, and expressed the hope that before the next session the Governments of Hungary and Rumania would do their best to reach an agreement.

I invited the representatives of the two Governments concerned—Count Csáky and M. Gajzágó, on behalf of Hungary, and M. Titulesco, on behalf of Rumania—to meet at Brussels on May 26. The Hungarian Government's request, dated March 15, 1923, was again considered and discussed.

An account of this discussion is given in the minutes, which have been examined by the parties concerned and are attached to the present report.

I think that I have fulfilled my task by having—with the valued assistance of the Hungarian and Rumanian representatives—made every effort, if not to reconcile opposing theses, at least to obtain as full a measure of agreement as possible between the two parties. The present question was brought to the attention of the Council under the second paragraph of Article 11 of the Covenant, the object of which is to remove any circumstance whatever affecting international relations which threatens to disturb the good understanding between Nations. In such a case as the present one, what has to be found is not an abstract legal solution (and, indeed, in any case, a glance at the attached minutes will show the difficulty even of this), but a practical solution which will give as full a measure of satisfaction as can be obtained with a view to a peaceful settlement.

I would propose that the Council should now take note of the confirmation of the declarations referred to in the minutes, and that it

[51] See the full text of Mr. Adatci's statement in Appendix IV.

should add thereto a general recommendation for conciliation. I would venture to suggest the following draft:

"The Council, taking note of the various declarations contained in the minutes attached to the report of the Japanese representative, hopes that both Governments will do their utmost to prevent the question of Hungarian optants from becoming a disturbing influence in the relations between the neighboring two countries.

"The Council is convinced that the Hungarian Government, after the efforts made by both parties to avoid any misunderstanding on the question of optants, will do its best to reassure its nationals;

"And that the Rumanian Government will remain faithful to the Treaty and to the principle of justice upon which it declares that its agrarian legislation is founded, by giving proof of its goodwill in regard to the interests of the Hungarian optants." [52]

The discussion on this report before the Council was opened by Count Apponyi's exposition of the stand taken by the Hungarian government.[53] After declaring that his government was unable to accept the conclusions of Mr. Adatci, he pointed out that there was "nothing unusual in a government disavowing its representative who . . . has exceeded his powers. . . ." He again contended that the problem to be solved was essentially a legal one: the interpretation of treaties. M. Titulesco, he said, asserted that patrimonial interests of no international concern were at stake, thereby basing the Rumanian argument largely on issues distinct from the juristic problems of the dispute. To this Count Apponyi made answer:

. . . When a country recognizes by means of a treaty freely concluded that certain questions have an international character, it thereby undertakes to conform, in any national solution of those questions, whether by legislative or executive action, to the provisions of that treaty. No degree of importance which the question may possess can

[52] League of Nations, Official Journal, Vol. 4, No. 8, p. 1011. Annex 533a.
[53] For the discussion before the Council, see League of Nations Official Journal, Vol. 4, No. 8, pp. 886-903, 904-8.

free a government from the obligation to observe the treaty which it has signed . . .[54]

Nor could the Hungarian government, said Count Apponyi, accept the premise of M. Titulesco that the Rumanian Constitution, being the supreme legal instrument as regarded all things concerning Rumania, and the agrarian law, being a fundamental law for that country, could not be subjected to the arbitration of the Permanent Court of International Justice. "It is impossible," said Count Apponyi, "to protest with sufficient energy against an idea which places the national legislation of a country, with whatever solemnity it may be enacted, above conventional international law. . . . What would be the object of concluding treaties or of undertaking international obligations if it were open to those who had undertaken them to escape from their effect by a legislative, executive or constitutional act or by an act of any other kind arising from their own authority?" [55]

Count Apponyi next entered upon a detailed analysis of the arguments of the Rumanian representative, presented during the deliberations of the last Council meeting, as to the reasons, motives and aims of the agrarian reform itself. With much eloquence, he maintained, basing his contention on elaborate statistical data, that the distribution of large, medium-sized and small estates in Transylvania was such as to require, far less than in any other part of the Kingdom of Rumania, a radical redistribution of landed property, and that, in spite of this fact, the agrarian law for Transylvania was more radical than the similar laws in force in the Old Kingdom. In proof of this allegation, he reviewed the provisions of the agrarian law applicable to Transylvania and the executive acts by virtue of which those provisions became effective; and, upon the same proofs, he averred that the law has been applied discriminatingly against Hungarian nationals.

[54] League of Nations Official Journal, Vol. 4, No. 8, p. 886.
[55] *Ibid.*, p. 887.

In discussing the legal issue, Count Apponyi maintained that the provision of Article 63 of the Treaty of Trianon, that persons who opted Hungarian nationality are entitled to retain their immovable property situated in the transferred territory, was violated by Rumania in three ways. He contended—

1. That Article 18 of the Rumanian Constitution, prohibiting aliens from owning land within the Kingdom, was in formal contradiction with the Treaty.
2. That, in imposing a penalty for absenteeism, the agrarian law was applied retroactively in a territory over which Rumania then had no sovereignty; that, during the time when absenteeism produced its effects (December 1, 1918-March 23, 1921), Transylvania was under military occupation, which gave no right to establish an organic law, to say nothing of the fact that at the time a majority of Hungarian landowners felt it necessary to retire before the Rumanian advance.
3. That the expropriation, although valid for all Rumanian nationals, could be applied to Hungarian nationals only so far as it was in conformity with the treaties.

Count Apponyi declared that the Hungarian government did not maintain that expropriation in general was incompatible with the treaties. "Expropriation," he said, "is not contrary to the Treaty if it is a genuine expropriation. . . . Expropriation, however, is contrary to the Treaty if it is in reality confiscation under the disguise of expropriation—that is to say, an act by which the owner is deprived of his property without compensation. . . ." [56] But the Hungarian government considered that an indemnity, the mode and method of which in fact provided a compensation of about one percent of the real value of the land, is no indemnity at all.

[56] League of Nations Official Journal, Vol. 4, No. 8, p. 892.

On the strength of these legal conclusions, his government, believing that there was an infringement of the rights of Hungarian optants, Count Apponyi said that Hungary was unable to accept the recommendations of Mr. Adatci, and he persisted in asking that the dispute be referred to the Permanent Court of International Justice; and in case the Council was not able to meet this request, the Hungarian government reserved "the right to take any measures which may be authorized by the Treaty and the Covenant of the League in order to obtain justice on behalf of its nationals." [57]

To the pleading of the Hungarian representative, M. Titulesco replied with equal eloquence. In opening, he stated the position of Rumania, which, he declared, he would not abandon. The main argument of M. Titulesco was that his government considered the minutes of the Brussels conversations to be a binding compact, in spite of the disavowal by the Hungarian government of its delegate; he asserted moreover that this agreement settled definitely all issues of the dispute except one, that of compensation. On this point he alleged that it would be impossible to meet the Hungarian demand, as payment in gold would impose an item of thirty-three milliards of paper lei on the Rumanian budget, the total of which in that year amounted to only thirteen milliards. He contended that because of the failure to agree on this one point, it could not be said that there was a failure *in toto* to reach an agreement. Nor would the Rumanian representative accept the assertion of the Hungarian government that its delegate exceeded his powers. Count Csáky, said M. Titulesco, had full powers "to treat and to sign in the name of the Royal Government of Hungary the provisions of the agreement to be concluded." This, said M. Titulesco, was exactly what happened: an agreement had in fact been concluded. Even admitting that the validity of this agreement as an international pact could be brought into question through the Hungarian government's disavowal, the engagements of Count

[57] League of Nations Official Journal, Vol. 4, No. 8, p. 894.

Csáky to the Rumanian representative still had the binding force of a private contract.

Furthermore, M. Titulesco brought forward arguments which in his opinion refuted the statements of Count Apponyi both as to the incompatibility of the agrarian law with the treaties and as to its discriminatory application, in either legislative or executive acts, to Hungarian nationals.

"It is therefore in perfect conformity with my sense of right," concluded the Rumanian representative, "that I declare in the name of the Rumanian government that we maintain the position laid down in the Brussels agreement, which has, in our view, an obligatory force, and that we look to that agreement for a solution of our difficulty." [58]

Lord Robert Cecil, representative of Great Britain on the Council, requested Mr. Gajzágó, who had been second Hungarian delegate at Brussels, to give a short account of the negotiations and of the circumstances leading to the affixing of the initials of Count Csáky to the draft resolution of Mr. Adatci. In complying, Mr. Gajzágó reiterated that no agreement had been concluded at Brussels; that it was emphasized several times during the conversations by Count Csáky as well as by himself that they had had no instructions as to the drafting of a resolution. He, therefore, had refused to affix his initials to the draft, being unwilling even to commit himself personally as did Count Csáky.

The discussion was continued at the afternoon meeting of the Council. Mr. Adatci, as Rapporteur, delivered his views on the matter, reminding the Council that he had suggested at the April meeting that the dispute be referred either for a decision or for an advisory opinion to the Permanent Court of International Justice. It was after the failure of this proposal that he sought a different solution. Should he renew his proposal, it would again be unsuccessful; hence, to his mind, the Council "would be acting wisely and in the general interest" should it adopt his draft-resolution. He did

[58] League of Nations Official Journal, Vol. 4, No. 8, p. 901.

not, however, conceal the fact that "this resolution had the grave defect of not solving the fundamental question," [59] and that he was the first to recognize this defect.

There then ensued a discussion among the members of the Council. Lord Robert Cecil expressed the opinion that the dispute could not be referred for a decision to the Permanent Court except upon the agreement of both parties. On the other hand, he had no doubt that it was within the powers of the Council to ask for an advisory opinion even in the face of opposition by one of the parties. In this particular case, however, he did not think it advisable to take such a step in view of the proceedings which had taken place in Brussels; he had no doubt that an agreement had been reached there. He, therefore, suggested the acceptance of Mr. Adatci's draft-resolution. He added that, if necessary, the matter could be reconsidered by the Council at some future date. He was supported by M. Branting, the representative of Sweden, and M. Hanotaux, representative of France, both emphasizing the view that the chief task of the Council was conciliation. M. Hanotaux proposed a resolution in the following terms:

> The Council, having noted the report and the conclusions of M. Adatci; bearing in mind the delicate situation resulting from the combination of circumstances which has caused one of the parties to refuse to ratify the approval given by its plenipotentiary to minutes which were evidently nothing but the first step towards conciliation; impressing upon the two parties who have asked for its intervention the fact that a just effort, made in conformity with the spirit underlying the League of Nations, should not be made in vain, approves the proposal of the Japanese representative and proceeds with its agenda.[60]

To this the Rumanian representative replied that his government would accept Mr. Adatci's proposal subject to the condition that the Council's resolution should bind Hungary and Rumania equally. He could not accept, however, the

[59] League of Nations Official Journal, Vol. 4, No. 8, p. 904.
[60] *Ibid.*, p. 905.

reservation of Lord Robert Cecil that the question might be reconsidered. Count Apponyi reiterated that Hungary was unable to adhere to the draft-resolution. To the personal contract theory propounded by M. Titulesco, he replied that the Brussels minutes consisted of considerations and statements only, which had no binding legal value until they resulted in a final arrangement and were accepted in final form by the respective governments.

Following a suspension of the meeting, M. Hymans, Belgium's representative, submitted a resolution. Before it was put to a vote, the Hungarian representative, in the name of his Government, made the following declaration:

> The question of the Hungarian optants in the districts detached from Hungary and annexed to Rumania being a legal question, the Hungarian Government continues to think that while an agreement, which it has not up to the present been possible to realize, is still lacking, the only solution capable of resolving the problem and easing the situation, which all the world desires, is a judicial settlement on the substance of the case. The Hungarian Government is unable to recognize that the minutes of the negotiations at Brussels, which did not result in a final agreement on the substance of the question, could involve it in any obligation.
>
> The profound respect which it feels for the Council of the League of Nations imposes upon it the duty of stating quite frankly that it is impossible for it, as it would be impossible for any other Government which found itself in a similar position, to take effective steps towards restoring peace in the minds of nationals who consider themselves and whom it also considers (so long as the judgment which they demand is refused) to be injured in respect of rights guaranteed by treaties.
>
> The resolution accepted by the Council does not contain—as was expressly stated in the report of His Excellency, M. Adatci—any decision regarding the substance of the case. The Hungarian Government therefore reserves the right to take any future steps which the treaties and the Covenant of the League of Nations may allow in order to obtain justice for those whom it has the right and duty to represent.[61]

[61] League of Nations Official Journal, Vol. 4, No. 8, p. 908.

M. Titulesco also made a declaration:

In the name of my Government, I accept the resolution which the Council has proposed. I thank the Council for having taken note in its resolution of all the statements which are to be found in the minutes of May 27; we see from this action that the Council has recognized the contention of my Government that the statements made at Brussels are of value and are not dead letter. This resolution confirms the Brussels agreement, and therefore all problems on which we have come to an arrangement by reason of that agreement are now solved. The engagements which we have undertaken will be respected and they are clearly determined; we ask that all engagements taken should be respected . . .

The resolution proposed by Mr. Hymans reads as follows:

The Council, after examining the report by M. Adatci dated June 5, 1923, and the documents annexed thereto,

Approves the report;

Takes note of the various declarations contained in the minutes attached to the report of the Japanese representative, and hopes that both Governments will do their utmost to prevent the question of Hungarian optants from becoming a disturbing influence in the relations between the two neighboring countries;

The Council is convinced that the Hungarian Government, after the efforts made by both parties to avoid any misunderstanding on the question of optants, will do its best to reassure its nationals;

And that the Rumanian Government will remain faithful to the Treaty and to the principle of justice upon which it declares that its agrarian legislation is founded, by giving proof of its goodwill in regard to the interests of the Hungarian optants.[62]

This resolution was adopted unanimously, Count Apponyi abstaining from voting.

Analysis of the League's Conciliation

With the adoption of the resolution of the Council, it may be said that the first stage of the dispute was closed. It is

[62] League of Nations Official Journal, Vol. 4, No. 8, p. 907.

therefore appropriate here to consider briefly the essential points of the opposing theses of Hungary and Rumania.

The first question deserving analysis is the request of the Hungarian government that the dispute should be submitted to the Permanent Court of International Justice either for a decision or for an advisory opinion. One may ask why the Council did not follow this seemingly reasonable suggestion. The Court is the judicial organ of the League, and there seems to have been little doubt in the minds of the members of the Council that the dispute turns on an essentially legal question. The best proof of this is given by the Rapporteur himself, Mr. Adatci, in the terms in which he suggested that this procedure should be adopted:

> Two opposite legal arguments are . . . before the Council, and *the settlement of the dispute will depend upon the interpretation of the treaties and on the legal examination of the Rumanian legislative stipulations* in question. Having regard to these considerations, I am of opinion that the most satisfactory method of reaching a solution would be for the parties themselves to submit the dispute to the legal authority set up in accordance with the Covenant of the League of Nations: the Permanent Court of International Justice.[63]

Why, then, was this "most satisfactory method of reaching a solution" not followed?

In order to submit a dispute for a decision to the Court, it is necessary that the parties thereto should agree to do so. The jurisdiction of the Permanent Court of International Justice is compulsory only for states which have declared, by signing the optional clause annexed to the Statute of the Court, or otherwise, their willingness to accept such compulsory jurisdiction.[64] Neither Hungary nor Rumania signed this optional clause. The refusal of the Rumanian representative to adhere to the draft-agreement [65] submitted by Mr. Adatci barred

[63] League of Nations Official Journal, Vol. 4, No. 6, p. 605. Italics the author's.

[64] Art. 36 of the Statute and the Optional Clause of the Protocol of Signature.

[65] *Supra*, note 39.

the possibility of referring the dispute for a decision of the Court.

Could not the Council have asked for an advisory opinion?

It seems that there was a divergence of opinion in the Council on this question. At the meeting of April 23, 1923, the possibility of asking for an advisory opinion regardless of the opposition of one of the parties was not considered. After M. Titulesco refused the second proposition of the Japanese representative—namely, that an advisory opinion be requested—the President proposed to adjourn the discussion until the next session of the Council, "as it had been impossible to reach an agreement." [66] It seems logical to conclude that in making such a proposal his reasoning was that an agreement of the parties was necessary in order to take the proposed step.

It is astonishing that a few months later, at the meeting of July 5, 1923, Lord Robert Cecil expressed the opinion that the Council might ask for an advisory opinion whether or not the parties in dispute agreed to such procedure. "There could be no doubt," read the minutes of the meeting, "that this [asking for an advisory opinion] was within the power of the Council, which could, if it wished to do so, take such a course even if the other party to the dispute were not willing; it would be a reference by the Council itself to the Court, independently of the parties to the dispute. . . ." [67] If this is so, it would seem that the Council should have adopted that course at its session of April, 1923, in view of the "two opposite legal arguments" underlying the dispute, as pointed out by the Japanese representative.

The question of the Brussels "agreement" should also be considered.

The Hungarian government asserted that the minutes of the Brussels conversations were not to be regarded as an agreement. Rumania, on the other hand, maintained that an

[66] League of Nations Official Journal, Vol. 4, No. 6, p. 609.
[67] *Ibid.*, Vol. 4, No. 8, p. 904.

"agreement" exists; that it is binding on the parties regardless of whether the Hungarian government gave its approval. The Hungarian delegate, alleged M. Titulesco, had full powers to conclude a convention; he initialed the minutes and the statements contained in those minutes became thereby binding on the parties; they cannot be repudiated.

However, the assertions of M. Titulesco as to the outcome of the Brussels Conversations seem to be at variance with the facts. The negotiations resulted in the drafting of two distinct and entirely separate documents:

1. The minutes of the Conversations which took place on May 27, 1923, at the Palace Hotel in Brussels between the representatives of Hungary and the representative of Rumania. This document was a summary of the discussions, drawn up by officials of the Secretariat of the League of Nations who were present during these discussions. It was drawn for Mr. Adatci, who was not even present during the Conversations. The minutes recorded certain statements made by the Hungarian and the Rumanian representatives, respectively, but, with the exception of two declarations drawn up by the representatives themselves and inserted into the report between inverted commas, it offered no guarantee of accuracy. Nor is there any indication that either of the parties intended that it be considered the draft of an agreement. In fact, these minutes were neither signed nor initialed.

2. A draft-resolution prepared by Mr. Adatci which he proposed to submit to the Council at its next session. It was only the morning following the breaking off of the negotiations, at the Japanese Embassy—not at the Palace Hotel, where the negotiations were held—that this draft-resolution was shown to, and discussed by, the Rumanian and Hungarian representatives and that their initials to one paragraph of the document were secured.[68]

[68] As to the history of the Brussels negotiations, see Brunet, René, "La réforme agraire et les intérêts privés Hongrois en Transylvanie," 54 *Journal de Droit International* (1927), pp. 319-45.

It is difficult to conceive how either of these two documents could be asserted to constitute a binding agreement. The Rumanian government has endeavored to convince the world that the minutes of the Brussels Conversations and the draft-resolution of Mr. Adatci are one and the same instrument. Moreover, every effort has been made to prove that the initials of Count Csáky, put under one paragraph of Mr. Adatci's separate draft-resolution, applied also to the minutes which thereby became a binding agreement between Hungary and Rumania. This Rumanian version was not without success, and the legend of an agreement brought about at Brussels between the two countries persisted for almost four years, until finally the Rumanian-Hungarian Mixed Arbitral Tribunal disposed of it once and for all.

Let us momentarily assume for the sake of argument that M. Titulesco was correct in his assertion that an agreement resulting from the Brussels Conversations was initialed by the first Hungarian representative. Even so, could one assert the existence of a binding agreement in the face of the subsequent disavowal, by one of the interested governments, of the act of its representative?

It has been pointed out above, and it is unquestionably true, that the repudiation by a government of engagements in whatever form undertaken by plenipotentiaries of that government is a regrettable event. It inevitably has an unfortunate effect, and the government thus acting is always liable to be put in a position where its good faith is questioned by its adversaries. However, there may be situations in which a government is compelled to repudiate an agreement, convention or treaty, and it seems to be a rather exaggerated attitude to assume that a government has to accept and abide unconditionally by anything which its delegates may sign. There are abundant instances in international law in which a state has deemed it necessary to refuse a treaty or a convention previously negotiated and even signed by its plenipotentiary.

It is a generally accepted principle of international law

that treaties, conventions or agreements have to be ratified in order to acquire the force of law. It is needless to point out that every kind of international agreement has a clause providing for ratification and stipulating that it will come into force at the time or after the exchange of ratification. This is the position taken by almost all writers on international law.

Furthermore, the assertion of the Rumanian representative that the Brussels minutes have the force of a personal contract is in contradiction with the modern conception of international law.

On this point we may quote Hall, who says:

The older writers upon international law held indeed that treaties, like contracts made between individuals through duly authorized agents, are binding within the limits of the powers openly given by the parties negotiating to their representatives and that consequently where these powers are full the state is bound by whatever agreement may be made in its behalf. But it was always seen by statesmen that the analogy is little more than nominal between contracts made by an agent for an individual and treaties dealing with the complex and momentous interests of a state, and that it was impossible to run the risk of the injury which might be brought upon a nation through the mistake or negligence of a plenipotentiary. It accordingly was a custom, which was recognized by Bynkerhock as forming an established usage in the early part of the eighteenth century, to look upon ratification by the sovereign as requisite to give validity to treaties concluded by a plenipotentiary; so that full powers were read as giving a general power of negotiating subject to such instructions as might be received from time to time, and of concluding agreements subject to the ultimate decision of the sovereign. . . .

Except when an international contract is personally concluded by a sovereign or other person exercising the sole treaty-making power in a state, or when it is made in virtue of the power incidental to an official station, and within the limits of that power, tacit or express ratification by the supreme treaty-making power of the state is necessary to its validity.[69]

[69] Hall, W. E., *A Treatise on International Law*, 5th ed., Oxford, 1904, pp. 330-31.

Hall concludes that "The necessity of ratification by the state may then be taken as practically undisputed. . . ."

It would be superfluous to quote the long list of distinguished writers in the field of international law who, back as far as Pufendorf and Vattel, in one form or in another have confirmed the theory that international engagements become binding through and by their ratification. This view is held also by the more recent writers, such as Liszt and Oppenheim.[70]

Professor Wilson, one of America's most reputed experts on international law, states his opinion as follows:

> Usually . . . the signing of a treaty by the representatives of the states is an indication that the representatives have reached an agreement. Whether this agreement will commend itself to the states by which they are accredited is to be determined by subsequent ratification. Many treaties are now concluded subject to ratification, even if the fundamental law of a state does not prescribe this method, and even if this condition is not mentioned in the treaty . . ." [71]

Nor can there be any question as to the right of a state to refuse ratification if it deems it necessary so to do. The history of the law of nations contains numerous instances where the ratification of a treaty or convention, signed by the duly authorized plenipotentiaries, was refused. Only recently the Senate of the United States refused the ratification of the Treaty of Peace of Versailles, although it had been signed by the American plenipotentiaries—including the President of the United States. Ratification was also refused by the Senate to the Treaty of Lausanne with Turkey. It would

[70] Liszt, F. von, *Das Völkerrecht,* 12th ed., Berlin, 1925, p. 252: "Die Staatenpraxis hat dahin geführt, dass von besonderen Fällen und besonderen Vereinbarungen abgesehen, zum rechtswirksamen Abschluss aller Staatsverträge die ausdrückliche und in feierlicher Form unmittelbar abgegebene Erklärung des Staatshauptes (des obersten Vertretungsorgans) hinzutreten muss—die Ratifikation." See also Oppenheim, L., *International Law,* 3d ed., London, 1920, Vol. 1, pp. 667 ff.

[71] Wilson, George G., *Handbook of International Law,* 2d ed., St. Paul, Minn., 1927, Sec. 79, p. 191.

be difficult to contend that the United States is nevertheless bound by the Treaty of Versailles or the Treaty of Lausanne by the simple fact of the signing of those treaties by her plenipotentiaries, and regardless of the refusal of the Senate to give its advice and consent. Nor is it possible to accept the point made by M. Titulesco, that the minutes of the Brussels conversations have the force of a contract as between himself and the Hungarian representative. Following this reasoning, one could take the position that the protocol annexed to the Treaty of Versailles, in which the United States and Great Britain undertake to guarantee the territorial integrity of France, though rejected by the Senate, nevertheless was an enforceable contract between President Wilson and M. Clémenceau.

Judge John Bassett Moore in his dissenting opinion in the Mavrommatis case, speaking of the coming into force of treaties, says:

> The doctrine that Governments are bound to ratify whatever their plenipotentiaries, acting within the limits of their instructions, may sign, and that treaties may therefore be regarded as legally operative and enforceable before they have been ratified, is obsolete, and lingers only as an echo from the past . . .[72]

This clear and explicit statement, which is applicable to written international engagements undertaken in any form and designated by any name, was not contested.

There is yet another reason why the Brussels minutes cannot be considered as an international agreement. Article 18 of the Covenant of the League of Nations provides:

> Every treaty or international engagement entered into hereafter by any member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. *No such treaty or international engagement shall be binding until so registered.*[73]

[72] Publications of the Permanent Court of International Justice, Series A, No. 2, p. 57.

[73] Italics the author's.

As both Hungary and Rumania are members of the League, Article 18 of the Covenant is binding upon them. The minutes of the Brussels negotiations have not been registered with the Secretariat of the League by either of the parties. Even if it were conceded that these minutes constituted an agreement, it cannot be considered binding prior to its registration with the Secretariat of the League.

Let us assume for a moment that the Rumanian point of view is admissible; that the Hungarian representative had full power to conclude an agreement; that the minutes of the Brussels conversations constituted such agreement, and that this agreement is binding on the parties regardless of the disavowal by the Hungarian government of its plenipotentiary. Granting this, the fact yet remains that no settlement of the dispute was brought about. The negotiations related to claims arising out of the expropriation of the property of Hungarian nationals. The minutes themselves summarize the complaints of the Hungarian government and register the fact that on the question of compensation "the two representatives considered it inadvisable to continue the discussion on the question of the redemption price; *no compromise appeared possible between their respective points of view.* . . ." [74] It cannot be denied that in the dispute over expropriation the amount of compensation constituted an essential element, and, as no accord on this vital point was reached, one is not justified in asserting that an agreement for the settlement of the whole dispute was reached.

From a purely technical point of view, a glance at the form of the minutes will raise a further question as to their designation as an agreement.[75] There is no indication of any of the conventional and generally accepted forms of written international engagements. Treaties, conventions and international agreements usually state that the duly authorized plenipotentiaries of the contracting parties agreed upon the

[74] League of Nations Official Journal, Vol. 4, No. 8, p. 1014. Italics the author's.

[75] See the minutes printed in Appendix II.

following clauses. Then follows the subject of the treaty or agreement, drafted in articles and concluding with provisions as to the ratification and coming into force of the instrument.

These forms were utterly neglected in the Brussels minutes. They set out with the simple statement that "It was agreed to take as basis of discussion the various points raised by the Hungarian request." They speak of *discussion,* not of *agreement* or *convention.* No indication is to be found of the engagements which the parties mutually undertake in order to eradicate the dispute. Nor is there any indication as to when and how the "agreement" will become operative. In general, it may be observed that the whole text of the minutes is so loose, and that the statements are so vague, that it would hardly serve even as a basis for an agreement to be concluded upon the subject-matter. Much less can one say that the minutes should, as they stand, be considered an agreement.

One is justified in believing that, if either of the parties had intended to conclude an agreement, due care would have been taken to have it drafted in proper form. The form followed in the drafting of treaties and conventions is fairly well established and consistent. The plenipotentiaries of Rumania and of Hungary at the Brussels conversations should be credited with knowing the form in which agreements are drafted, and they would naturally have followed such form had they intended to make an agreement.

It has been necessary to deal somewhat at length with the question of the Brussels "agreement," in view of the fact that Rumania, later in the controversy, rests one of her main contentions on the existence of this "agreement," as determining finally the dispute as to expropriation. We shall now turn to the next stage in the controversy, and there we shall discover the attitude of the Rumanian-Hungarian Mixed Arbitral Tribunal concerning this assertion that the Brussels "agreement" had settled once and for all the question of the expropriation of the landed estates of Hungarian optants.

Chapter III

THE DISPUTE BEFORE THE RUMANIAN-HUNGARIAN MIXED ARBITRAL TRIBUNAL

Rumania's Demurrer to the Jurisdiction of the Tribunal

The conciliatory action of the League's Council seems to have failed, as it did not solve the dispute on its merits. The Council simply approved the report of Mr. Adatci, a report which, as the Rapporteur himself had stated, had the grave defect of leaving the problem unsettled. Moreover, the Council expressed the hope that "both Governments will do their utmost to prevent the question of Hungarian optants becoming a disturbing influence in the relations between two neighboring countries." The Council's resolution is silent on the question whether the Hungarian complaints as to the incompatibility of the Rumanian law with treaties, and as to the injurious treatment of Hungarians in the annexed territory, are justified or not. Nor is there any indication as to the mode and procedure by which these controverted questions should be referred to and determined by an impartial international authority.

After the failure of the League's mediation, the expropriated Hungarian landowners began to bring suits against Rumania, in accordance with Article 250, paragraph 3, of the Treaty of Trianon, in the Rumanian-Hungarian Mixed Arbitral Tribunal, established under Article 239 of the Treaty. Since December, 1923, some 285 claims have been filed with the Tribunal. These cases, although differing in details, have been similar in substance.[76]

[76] For a collection of different types of cases filed with the Tribunal, see *Les lois roumaines de réforme agraire devant le Tribunal Arbitral Mixte Roumano-Hongrois* (No. 93606), Imp. Desfossés, Paris.

The complainants requested the Tribunal
(1) to declare the measures applied by the Rumanian state against their property to be contrary to Article 250 of the Treaty of Trianon;
(2) to require Rumania to make restitution—*restitutio in integrum*—of their movable and immovable property;
(3) to obligate the Rumanian state to pay an indemnity for all losses and damages, and to reimburse the plaintiffs for all expenses incurred in consequence of the measures under complaint;
(4) in case restoration of the whole or of any part of the property should be impossible, to require Rumania to pay to the plaintiffs the value thereof;
(5) to fix the amount of indemnity *ex aequo et bono;*
(6) to hold the defendant liable for costs;
(7) finally, to enjoin the Rumanian state from the execution of all measures which might affect the property or restrict their rights thereto.[77]

The Rumanian government in a demurrer (*demande exceptionnelle*) challenged the jurisdiction of the Tribunal on the ground that

(1) Article 250 of the Treaty of Trianon is applicable only to the property which was seized under exceptional measures of war, as liquidation or forced administration. In other words, only measures affecting enemy property as such and granting no compensation are thereby prohibited. Moreover, this is true only as regards such measures as were taken between the day of the Armistice and the coming into force of the Treaty;

(2) The land reform law does not constitute such an exceptional measure; it was enacted "in the interest of high social justice" and affects equally nationals and aliens. Furthermore, the owners receive compensation.

[77] See, in the collection referred to, *supra*, note 76: Request of *Emèric Kulin père c. Etat Roumain*, pp. 17 ff., filed with the Secretariat of the Tribunal on December 29, 1923.

Upon these arguments, the Rumanian government asked the Tribunal

(1) to dismiss the claims because of want of jurisdiction;

(2) to condemn the applicants to pay the costs.[78]

Reply was made to the demurrer of the Rumanian government; rejoinder and counter-rejoinder were filed during the year 1926; finally, the Tribunal began to hear oral arguments during its sittings in Paris in December, 1926. Of the several hundred claims, twenty-two were considered by the Tribunal, which had, however, first to determine its competence to take jurisdiction.

At eight of the meetings between December 15 and December 23, oral arguments were heard, eminent international jurists pleading for both parties. The Rumanian state was represented by M. Millerand, ex-president of France; M. Politis, formerly Greek minister of foreign affairs, and the delegate of Greece to the League of Nations; and Dr. Rosental, barrister at the Court of Appeals in Bucharest. The Hungarian nationals entrusted their interests to Messrs. Lakatos and Egry, two prominent members of the bar of Budapest; M. Gidel, professor of international law at the École des Sciences Politiques, in Paris; M. Brunet, professor of law at the University of Caen; and M. Barthélemy, professor of law at the University of Paris. The agents of the two governments, Mr. Gajzágó of Hungary and M. Popesco-Pion of Rumania, also took part in the oral arguments.[79]

The Tribunal in a judgment delivered on January 10, 1927, overruled the demurrer of Rumania, declared itself competent, and instructed the defendant to file its answer on

[78] The first demurrer was filed with the Secretariat of the Tribunal on April 20, 1925. See Collection (*supra,* note 76), pp. 47 ff.

[79] The oral procedure before the Mixed Arbitral Tribunal is reproduced in A. de Lapradelle, *Recueil de la jurisprudence des Tribunaux Arbitraux Mixtes créés par les Traités des Paix,* Vol. 4 (*Compétence*), Paris, 1927, pp. 134 ff.

the merits of the case within two months from the date of notification of the judgment.[80]

Jurisdiction of the Tribunal over Agrarian Cases [81]

The demurrer of the Rumanian Government challenging the jurisdiction of the Mixed Arbitral Tribunal, and the decision of the Tribunal overruling the Rumanian demurrer present some interesting questions which, from the point of view of international law, deserve a careful analysis. It will be helpful to consider the arguments upon which the demurrer was based and the reasons which in the estimation of the Tribunal justified its declaration of its competence.

The Rumanian contention was that the Tribunal has no jurisdiction because its competence is limited to cases of "retention and liquidation," as defined by Articles 232 and 250 of the Treaty of Trianon; that "retention" and "liquidation," as used in the peace treaties, designate exceptional measures of war, directed against the property of ex-enemies, for the purpose of reparation and applicable to property only if it is ex-enemy property; that expropriation is, on the contrary, a measure alien to liquidation, because it is a measure of general application for purposes of public utility; that expropriation in accordance with the Rumanian land reform law cannot, therefore, be defined as liquidation. M. Millerand contended

[80] *Emeric Kulin père c. État Roumain, Recueil des décisions des Tribunaux Arbitraux Mixtes,* Vol. 7, pp. 38-162. Tribunal Arbitral Mixte Roumano-Hongrois, Docket No. R. H. 139. See the full text of the judgment with the dissenting opinion of the Rumanian arbitrator printed in English translation in Appendix VI.

[81] On the question of jurisdiction, the Hungarian claimants requested the opinion of several international jurists of the highest authority. See these opinions collected in A. de Lapradelle, *Recueil,* etc. (*supra,* note 79): Opinion of M. Pillet, late professor of private international law at the University of Paris, pp. 61 ff.; Opinion of M. Ch. Dupuis, professor of international law at the Ecôle des Sciences Politiques, in Paris, pp. 70 ff.; Opinion of M. A. de Lapradelle, professor of international law at the University of Paris, pp. 88 ff; Opinions of Mr. Roland E. L. Vaughan Williams, His Majesty's Counsel, and Sir Frederick Pollock, professor of law at Oxford, pp. 124 ff.; and Opinion of Dr. Hugh L. Bellot, professor at the Académie de Droit International, in The Hague, pp. 535 ff.

that the principle of expropriation is the predominance of national interests over individual interests; that the state in its sovereign capacity is the sole judge of such interests and that if the state finds it necessary to proceed to expropriation, it has the authority to prescribe such rules as it sees fit, and to carry this expropriation into effect in any way it thinks best. It follows from the sovereignty of the state that expropriation will affect the property situated within its territory, regardless of the nationality of the owner: the *lex rei sitae* is a generally recognized principle of international law. The pleadings on behalf of Rumania also pointed out that the Hungarian delegation, when addressing the Peace Conference with respect to Article 250 of the Treaty, asked only that the property of Hungarian nationals should be subject to no measures other than those applied equally to the nationals of the Succession States. Finally, reference was made to the Brussels negotiations which, in the opinion of the Rumanian government, settled the dispute conclusively.

The claimants contended, on the other hand, that the measures of seizure or of liquidation of Hungarian property, though executed by virtue of an agrarian law, constitute a violation of Article 250 of the Treaty of Trianon and as such come within the jurisdiction of the Tribunal. The Hungarian pleadings especially emphasized the fact that the measures in effect deprived the claimants of their property in its entirety, without their consent and without compensation, or, at best, with only a nominal compensation.

Neither party contested the jurisdiction of the Tribunal in cases of "retention or liquidation." The question was, therefore, whether expropriation might not constitute, under specific circumstances, such retention or liquidation. The Tribunal decided that the application of the Rumanian agrarian law, under certain conditions, might constitute a retention or liquidation within the terms of Article 250 and that, consequently, it has jurisdiction in order to determine whether or not the Rumanian agrarian law is in fact liquidation.

The Tribunal stated that

. . . in inserting Article 250 in the Treaty of Trianon, the Allied and Associated Powers intended to place the property, rights and interests of Hungarian nationals situated within territories of the former Austro-Hungarian Monarchy entirely outside the effect of all the measures mentioned in Article 232 and in the Annex to Section 4 as well as in Article 250 itself, and to place such property, rights and interests under the government of common international law;

and concluded from this premise that

. . . the Tribunal should refer to the principles of common international law whenever it is called upon to decide on a claim under Article 250.

To the Rumanian contention that expropriation under the agrarian law does not constitute seizure and liquidation within the meaning of Article 250, the Tribunal answers:

. . . what is material in arriving at a just appreciation of the question of the competence of the Tribunal is therefore to ascertain whether the measures, complained of herein, present or not the characteristic features of one or other of the measures which, under Article 250, may give rise to claims that can be submitted to the Mixed Arbitral Tribunal; and . . . if the Tribunal finds that such is the case there are already sufficient facts to establish its competence, but it is only by examining the merits of the claim that it will be in a position to ascertain whether really the circumstances of the case are such as to come within the application of Article 250 . . .

The allegation that the expropriation was carried into effect in execution of a law was held by the Tribunal to go to the merits of the case; nor does the question of compensation have any bearing on the plea to the jurisdiction. But the Tribunal was of the opinion that

. . . the other facts brought forward by the Claimant are sufficient to show that the measure concerned in the case is one which affects the property of an ex-enemy by removing it in its entirety from the owner,

and without his consent; and this measure constitutes a violation of the general principle of the respect of vested rights and oversteps the limits of common international law and fully presents the character of a liquidation within the meaning of Article 250 and is by its very nature to be classed among the measures referred to in the said article . . .

Finally, the Tribunal rejected the argument that the dispute had been settled at the Brussels conversations and exploded the theory of the existence of the Brussels "agreement." It will be remembered that the Rumanian contention during the discussions at the Council meeting of July, 1923, was based on the following passage in the minutes of the Brussels Conversations:

As to the question of incompatability between the Rumanian law and the provisions of the Treaty relating to the rights of persons having opted for Hungarian nationality, it is admitted—and the Hungarian representatives do not contest this—that the Treaty does not oppose any expropriation of the property of such persons for reasons of public utility including the social necessities of an agrarian reform.[82]

The Tribunal, taking into consideration a further passage of the minutes, where the Hungarian delegates expressed the opinion that expropriation necessarily carries with it cash payment, came to the conclusion that

. . . in no case did the Hungarian delegates understand by the word "expropriation" as occurring in the passage quoted above the taking away without adequate indemnity of the property of persons having opted for Hungarian nationality; and . . . it results from the foregoing that the acknowledgement of the compatibility of the expropriation with the Treaty necessarily presupposes, therefore, in the Hungarian representatives' opinion, compliance with all the ordinary rules of expropriation, one of which is the immediate payment of an adequate indemnity . . .

[82] See full text printed in Appendix II.

Thus, the Tribunal sets aside the legend of the Brussels "agreement":

. . . moreover—assuming hypothetically that the passage quoted is a real acknowledgment—it should be borne in mind that the fact occurred in the course of negotiations between representatives of the two Governments with the object of arriving at an understanding concerning the matter forming the subject of the request dated the 15th of March, 1923, and for this purpose the conversation dealt with five different points which formed together the very subject of the dispute between the two Governments, and the passage quoted above refers to the first of these points; that if a conciliatory declaration was made at the beginning of the negotiations by the Hungarian representatives, it must of necessity be interpreted only as the expression of a desire to arrive at an understanding, or as a concession made in the hope of obtaining concessions from the opposing party on other points, with a view to arriving ultimately, through mutual concessions, at an agreement on all the five points and thus on the whole matter in dispute; that in any case a concession made under such circumstances could not be alleged against the party making same except where it formed an integral part of an agreement concluded subsequently and bearing on the whole matter in dispute, which has not occurred; that in fact the account states, as regards point No. 3—fixation and nature of the indemnification—that after an exhaustive conversation and declarations by both sides, "both representatives deemed it inadvisable to prolong the discussion on the question of purchase price, no agreement between their respective theses appearing possible"; that if at Brussels agreement was reached on other litigious points—a question the Tribunal has no reason to concern itself with—in any case it is acknowledged that on one point at least, which is of capital importance, the account had to record that there was absolute divergence between the representatives; that it is not admissible in law to detach, as is done by the Respondent, from the text of the account, an isolated declaration and, without consideration of the circumstances in which it was made, to put it forward as an official acknowledgment from the Hungarian Government, capable of binding all Hungarian nationals and depriving them consequently of the right which is absolutely guaranteed to them by Article 250 and which enables them to submit to this Tribunal any claim arising under the said article; that in these circumstances, even if the declaration

in question was really an acknowledgment made by the representatives of the Hungarian Government, it must be admitted that it is of no value as regards the settlement of the present dispute . . .

The Tribunal, in declaring its jurisdiction, carefully avoided any dealing with the merits of the case, although both parties brought into their pleadings substantive arguments. The decision did not go into any of these arguments. It did not decide whether the measures in complaint are or are not liquidation within the terms of Article 250 of the Treaty of Trianon. It simply stated that expropriation might, under certain circumstances, constitute a liquidation; but that only upon the merits of each individual case can it be established whether such circumstances exist.[83]

It is well to point out that the Rumanian-Hungarian Mixed Arbitral Tribunal, in its reasoning, adhered to the principles established by the Permanent Court of International Justice in its Sixth and Seventh Judgments concerning certain German interests in Polish Upper Silesia. The issue in the Polish-German case, with all its incidents, is so similar to that involved in the Rumanian-Hungarian dispute that it offers itself for analogy.

Germany brought suit against Poland in the Permanent Court of International Justice on the ground that the proposed expropriation of certain factories and large rural estates under the Polish law of July 14, 1920, was contrary to certain designated articles of the Treaty of Versailles and the Geneva Convention concluded between Germany and Poland. The Geneva Convention provided in Article 6 that Poland might expropriate in Polish Upper Silesia certain industrial under-

[83] For an analysis of the decision of competence, see: Dupuis, Ch., "Les arrêts de compétence du Tribunal Arbitral Mixte Roumano-Hongrois," 8 (3e Sér.) *Revue de droit international et de législation comparée* (1927), pp. 1 ff.; Pillet, A., "Les affaires agraires des ressortissants hongrois devant le Tribunal Mixte Roumano-Hongrois," 34 (3e Sér.) *Revue générale de droit international public* (1927), pp. 1-19; Scelle, George, "L'arrêt du 10 janvier 1927, du Tribunal Arbitral Mixte Roumano-Hongrois," *ibid.*, pp. 433-82. See also Brunet, René, "La réforme agraire et les intérêts privés hongrois en Transylvania," 54 *Journal du droit international* (1927), pp. 319-45.

takings and large rural estates subject to the reservations in Articles 7-23 of the Convention.[84] Article 23 provides for the submission to the Permanent Court of International Justice of disputes arising out of the application or interpretation of Articles 6-23. In accordance with Article 23, Germany asked the Court to declare that the Polish law of July 14, 1920, constituted a measure of liquidation and was contrary to the provisions of the Treaty of Versailles and to the Geneva Convention. This was the exact situation in the Rumanian-Hungarian dispute: the claimants before the Mixed Arbitral Tribunal contended that expropriation in accordance with the Rumanian law of July 30, 1921, constitutes a measure of liquidation and is contrary to the Treaty of Trianon. The wording of the articles,[85] by which the property, rights and interests of German and Hungarian nationals respectively are safeguarded and by which disputes relative to such property, right and interests should be referred to the Permanent Court of International Justice and the Mixed Arbitral Tribunal respectively, is almost identical.

As the Rumanian government demurred to the jurisdiction of the Mixed Arbitral Tribunal, so the Polish government had brought a plea to the jurisdiction of the Permanent Court of International Justice. Poland alleged that Article 23 of the Geneva Convention limited the jurisdiction of the Court to cases of liquidation—just as Rumania alleged that the Tribunal's jurisdiction is limited by Article 250 of the Treaty of Trianon to cases of retention and liquidation.

Nevertheless, the Permanent Court of International Justice declared its competency. "It is clear," reads the decision, "that the Court's jurisdiction cannot depend solely on the wording of the Application; on the other hand, it cannot be ousted merely because the respondent party maintains that the

[84] League of Nations Treaty Series, Vol. 9, p. 466; Convention between Germany and Poland relating to Upper Silesia, signed at Geneva, May 15, 1922.

[85] Article 297 of the Treaty of Versailles, Article 6 of the Geneva Convention, and Articles 53 and 250 of the Treaty of Trianon.

rules of law applicable in the case are not amongst those in regard to which the Court's jurisdiction is recognized. . . ." [86]

The Court rendered no decision on the merits of the German application; similarly, the Tribunal reserved judgment on the merits of the Hungarian claims. Neither judgment asserted jurisdiction on the ground that expropriation in accordance with the Polish and Rumanian laws respectively constituted liquidation within the terms of the corresponding articles of the treaties and of the Geneva Convention: the fact that such expropriation *might* constitute liquidation was considered sufficient, both by the Court and by the Tribunal, for the exercise of their jurisdiction, in order to determine whether liquidadation had, contrary to the terms of the treaties, in reality taken place. Naturally enough, the Tribunal felt that the judgment of the Permanent Court of International Justice on this point established a precedent which it could safely follow—indeed, ought to follow as the adjudication of an international court of the highest authority, in the establishment of which all the contracting parties participated.

Due to the striking similarity of the two cases, let us go a step further and consider for a moment the decision reached as to the merits of the German-Polish case by the Court.

The first question before the Court was the meaning of the word "expropriation" as used in the text of the Geneva Convention. The Court concluded that,

> Having regard to the context, it seems reasonable to suppose that the intention was, bearing in mind the régime of liquidation instituted by the Peace Treaties of 1919, to convey the meaning that, subject to the provisions authorizing expropriation, *the treatment accorded to German private property, rights and interests in Polish Upper Silesia is to be the treatment recognized by the generally accepted principles of international law . . .*[87]

[86] Publications of the Permanent Court of International Justice, Series A, No. 6, p. 15.

[87] *Ibid.*, No. 7, p. 21. Italics the author's.

The Court does not fail to define these "generally accepted principles of international law":

> Head III [of the Convention] only refers to Polish Upper Silesia and establishes in favor of Poland a right of expropriation which constitutes *an exception to the general principles of respect for vested rights* . . . There can be no doubt that the expropriation allowed under Head III of the Convention is a *derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights* . . .[88]

From this we may deduce that expropriation without an agreement, such as the Geneva Convention which allows expropriation in specific cases and under specific conditions, or expropriation without a reason recognized by international law, such as public interest or judicial liquidation, is contrary to the generally accepted principles of international law.[89]

Analyzing further, we find two other cardinal principles laid down in this judgment of the Permanent Court.

First, expropriation, if not in conformity with the agreement upon which it proceeds or if otherwise overstepping the limits set by international law, is unlawful regardless of the name—land reform or anything else—which is given it:

> The legal designation applied by one or other of the interested parties to the act in dispute is irrelevant if the measure in fact affects German nationals in a manner contrary to the principles enunciated above . . .[90]

In this pronouncement, the Permanent Court reiterated well-established doctrines. A passage in the Delagoa Bay Arbitration reads as follows:

[88] *Ibid.*, at pp. 21-22. Italics the author's.

[89] See an exhaustive analysis of the Seventh Judgment of the Permanent Court of International Justice by Professor Gidel: "L'arrêt No. 7 de la Cour Permanente de Justice Internationale," 1927, *Nouvelle revue de droit international public*, Nos. 1–2, pp. 1–54.

[90] Publications of the Permanent Court of International Justice, Series A, No. 7, p. 22.

. . . whether the act of the Government be called a measure of arbitrariness and spoliation or a sovereign act prompted by the reason of state to which any railroad concession may be said to be subordinated, even though the present case be considered one of legal expropriation, it remains that its effect was to deprive individuals of their private rights and privileges which the concession conferred on them, and that . . . the state responsible for such privation is bound to pay in full for the injury it has inflicted . . .[91]

Second, expropriation without compensation cannot be justified by its application to nationals as well as to aliens:

Even if it is proved . . . that, in actual fact, the law applies equally to Polish and German nationals, it would by no means follow that the abrogation of private rights effected by it in respect of German nationals would not be contrary to Head III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Head III of the Convention; and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals.[92]

Bearing in mind the fact that, in exercising jurisdiction, the Permanent Court of International Justice applied "international custom as evidence of general practice accepted as law" and "the general principles of law recognized by civilized nations," [93] it seems sound to assume that the principles laid down in this judgment, although articulated with respect to a given convention and in view of the particular provisions thereof, might be applied *mutatis mutandis* to exproportion in general. Having substituted general terminology for the particular wording, the above quotation reads as follows:

Even if it is proved . . . that, in actual fact, the law applies equally to *nationals* and *aliens,* it would by no means follow that the abrogation of private rights effected by it in respect of *aliens* would not

[91] Martens, *Nouveau recueil général des traités,* 2e Sér., Vol. 30, pp. 329 ff.
[92] Publications of the Permanent Court of International Justice, Series A, No. 7, pp. 32-33.
[93] Statute of the Permanent Court of International Justice, Article 38.

be contrary to *its generally accepted principles,* and a measure prohibited by *international law* cannot become lawful under *any* instrument by reason of the fact that the state applies it to its own nationals.

The result would be that expropriation of alien private property without adequate compensation must be deemed unlawful, except in instances recognized by the law of nations—for public interest, as judicial liquidation, or in compliance with a special agreement; that it must be deemed such regardless of what name it is given; and that expropriation without remuneration would constitute a prohibited act which would not become lawful through its application to nationals.

It would be presumptuous to assume that a decision of the Rumanian-Hungarian Mixed Arbitral Tribunal on the merits would proceed along this line of reasoning. It is not impossible, however, that a similar weighing of the case at issue prompted the Rumanian government to respond to the decision of the Tribunal concerning its jurisdiction in a most unusual and seldom justifiable manner: with the recall of the Rumanian arbitrator from the Tribunal.

The Recall of the Rumanian Arbitrator

At the beginning of the oral arguments before the Mixed Arbitral Tribunal, M. Millerand, counsel for Rumania, stated that the Rumanian government reserved the right to adopt any decision or attitude which it might consider advisable in case a decision in favor of the Tribunal's competence should be given.[94] According to Article 239, paragraph *g,* of the Treaty of Trianon,

> The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals.

[94] See the pleading of M. Millerand in de Lapradelle, *op. cit.* (*supra,* note 79), pp. 135-36: "Seule . . . la déférence envers le Tribunal nous a amenés ici . . . Je réserve, de la manière la plus formelle, au nom du Gouvernement roumain, le droit de prendre, dans l'évènement, telle attitude qu'il jugera utile . . ."

There seems little doubt as to the meaning of this provision. The strict observance of the Treaty requires the litigating parties—in this case Hungary and Rumania—to abide by the decision of the Tribunal; there is no intimation that either party may reserve the right "to take any attitude" towards such decision.

Rumania, instead of filing her answer on the merits of the complaints in compliance with the Tribunal's request, declared that she would not accept the decision. The action of the Rumanian government was brought to the knowledge of the President of the Mixed Arbitral Tribunal in a letter written by M. Millerand, dated February 24, 1927, which reads as follows:

> On December 15, 1926, I had the honor to state before the Mixed Rumano-Hungarian Arbitral Tribunal our reasons for considering that the requests of the Hungarian nationals, optants and non-optants—claiming that the steps taken in pursuance of the agrarian reform, carried out a few years ago by Rumania to the lasting credit of her sovereign, her statesmen and her governing classes, fell within the category of measures of liquidation prohibited under Article 250 of the Treaty of Trianon—constituted a purely political move with only a thin disguise of legal justification.
>
> I hastened to add that it was only out of deference for international justice that we appeared before the Mixed Arbitral Tribunal to offer these explanations, and that on no consideration whatever could we consent to discuss the substance of these suits, and that therefore, as the legal proceedings were in this case merely a formality, I must expressly reserve my right, on behalf of the Rumanian Government, to adopt any decision or attitude which, having regard to the course of events, it might consider advisable.
>
> The decision which the Mixed Arbitral Tribunal rendered, by a majority, on January 10, shows only too well how fully these reservations were justified.
>
> The Arbitral Tribunal declares in fact, by a majority, that, in order to establish its competence, it need only satisfy itself that the case before it is one of the expropriation of a Hungarian estate without the consent of the owner, and that the fact that the measures complained

of were taken under the agrarian reform law and were not of a discriminatory character is a point which does not affect its competence and must be argued when the substance of the case is examined.

Thus, when invited to state whether or not it is competent, the Tribunal declines, by a majority, to express an opinion on the points which constitute the essential distinction between measures of liquidation, in respect of which it is competent, and measures of expropriation, in respect of which it is not competent.

The Tribunal summons the Rumanian Government to its bar with a view to the discussion of a national law which has been recognized as consistent with the Treaty of Trianon by the Hungarian Government in an agreement concluded under the auspices of the League of Nations and forming the basis of the Council's resolution of July 5, 1923—a national law which, by its very nature, can be referred to no other jurisdiction than that of the Rumanian courts. The results of the agrarian legislation, which was the fruit of prolonged struggles and of a compromise between the interests of classes and which has already been enforced for a number of years, could not be called in question for a moment without jeopardizing social peace in Rumania and even the peace of Europe.

You will not, I am sure, be surprised that, for the different reasons that I had the honor to state before the Mixed Arbitral Tribunal as well as for those which were advanced by my colleagues, the Rumanian Government, abiding loyally by the Treaty of Trianon and conscious alike of its rights and its obligations, should decline to accede to such a ruling.

I have the honor to add that I am instructed by the Rumanian Government to inform you that it will refrain from submitting any reply regarding the substance of these suits, and that, in consequence, its arbitrator will no longer sit on the Rumanian-Hungarian Mixed Arbitral Tribunal in any of the agrarian cases submitted by the Hungarian nationals.[95]

There are few actions on the part of a state which could be more deserving of disapproval than the recall of its judge from an international tribunal. It certainly is discouraging

[95] M. Millerand's above quoted letter, in the original French text, was attached as Annex B. 2. to the request of the Hungarian government to the League of Nations, dated May 21, 1927.

to the future development of international arbitration if a party, displeased by a decision, may halt the normal functioning of such tribunal by recalling its arbitrator. It has previously been shown that the action of the Hungarian government in disavowing its representative to the Brussels Conversations was made the subject of criticism notwithstanding the adequate justification for the act. In the case of Rumania's refusal to abide by the decision of the Mixed Arbitral Tribunal which is, according to the unequivocal provision of the Treaty of Trianon, final and conclusive, the criticism is aggravated by the apparent absence of any justification whatsoever. The Rumanian government very probably felt the necessity of giving some sort of explanation before the bar of public opinion. It therefore addressed a request to the League of Nations, under Article 11, paragraph 2, of the Covenant, to explain the reasons which, in its opinion, justify the attitude taken by Rumania regarding the decision of the Mixed Arbitral Tribunal.

The dispute was thus brought a second time before the Council of the League, and entered upon a new phase which will be dealt with fully in the following chapter. Before proceeding to the consideration of this new aspect of the dispute presented by Rumania's application to the League, it may be advisable to examine the question of the jurisdiction of international courts in general.

Jurisdiction of International Tribunals

International courts and arbitral tribunals derive their jurisdiction from treaties, conventions or special agreements establishing such tribunals or conferring jurisdiction upon tribunals already in existence. In consequence, the competence of international tribunals is necessarily limited and the history of international arbitration records abundant instances where one of the parties demurred to the jurisdiction of the tribunal. The fact that Rumania raised the question of competence is

not extraordinary; she had a right so to do, and no objection can ever be made if one of the parties to an arbitration deems it necessary to contest the jurisdiction of a tribunal. Such demurrers have been so frequent that an analysis of the occurrence is not warranted. That any tribunal has the power to determine its own competence is so generally conceded that it is never even discussed unless it is positively refuted by one of the parties. The recall of the Rumanian arbitrator seems to be such a direct denial of the right of the Rumanian-Hungarian Mixed Arbitral Tribunal to adjudicate its competence.

Jurisdiction of courts has been defined as "the power conferred on the courts by constitution or statute, to take cognizance of the subject-matter of a litigation and the parties brought before it, and to legally hear, try and determine issues, and render judgment according to the general rules of law upon the issued joined, be they either of law or fact or both." [96] In every state it is the court itself which decides upon its competence and it seems reasonable that international tribunals should follow the general rule.

Early writers believed that the international judge or arbitrator has only a mandate and, upon this conception, has a very limited power which excludes the interpretation of the convention establishing the tribunal or the determination of its competence. Rivier, for instance, says that in case of doubt as to the meaning of the convention, the arbitrator should ask further instructions from the parties, in view of the fact that a mandatory has no right to interpret his mandate.[97] This point of view was confirmed by Bonfils.[98]

Nevertheless, this very narrow construction of the power of an arbitral tribunal, which gave the arbitrator the status of a mandatory only, instead of that of a judge, was not, even in early times, a generally accepted theory of international law.

[96] Brown, T., *Commentaries on the Jurisdiction of Courts,* 2d ed., Chicago, 1901, p. 5.

[97] Rivier, A., *Principles du droit des gens,* Paris, 1896, Vol. 2, p. 174.

[98] Bonfils-Fauchille, *Manuel de droit international,* 7th ed., Paris, 1914, p. 654.

The question of competence was raised before the Mixed Claims Commissions organized under Articles 6 and 7 of the Treaty of November 19, 1794, between the United States and Great Britain. In the case of *The Betsey* the British commissioners demurred to the jurisdiction of the commission and withdrew therefrom in order to prevent a decision upon that issue. The American commissioner, Mr. Gore, in his opinion filed on the question of competence, stated:

> A power to decide whether a claim preferred to this board is within its jurisdiction, appears to me inherent in its very Constitution, and indispensably necessary to the discharge of any of its duties. . . . To decide on the justice of the claim, it is absolutely necessary to decide whether it is a case described in the article. It is the first quality to be sought for in the examination. To say that power is given to decide on the justice of the claim, and according to all the merits of the case, and yet no power to decide or examine if the claim has any justice, any merit even sufficient to be the subject of consideration, is to offer in terms a substance, in truth a phantom. . . . To my mind there can be no greater absurdity than to conceive that these two nations appointed commissioners with power to examine and decide claims; prescribed the rules by which they were to examine them; authorized them for this purpose to receive books, papers and testimony, examine persons on oath, award sums of money and solemnly pledged their faith to each other, that the award should be final and conclusive, . . . and yet gave them no power to decide whether there was any claim in question. . . .[99]

After a series of conversations between the two governments, Great Britain denounced the withdrawal of its commissioners. Lord Chancellor Loughborough expressed the opinion

> that the doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; and that they must necessarily decide upon cases being within, or without, their competency.[100]

[99] Moore, J. B., *History and Digest of International Arbitration,* Washington, 1898, Vol. 3, pp. 2278, 2282, 2284.

[100] *Ibid.,* Vol. 1, p. 327.

It should be remembered that these opinions were expressed at the end of the eighteenth century, when arbitration lived, indeed, in its childhood. From that time, arbitration as a medium preferable to war in settling international disputes has gained wider and wider recognition. This development has been especially marked since the middle of the nineteenth century. It was towards the end of that century that a controversy arose between the United States and Chile as to certain claims which, it was asserted by the Chilean government, should be barred from the consideration of a mixed claims commission. Mr. Olney, then Secretary of State, responded that

> the question whether any particular claim is a proper one for the consideration and decision of an international commission is necessarily one which the commission itself must determine. The conventions describe in general terms the class of cases of which the commission is under which such commissions are organized usually describe in general terms the class of cases of which the commission is to take jurisdiction, and whether any particular case presented to it comes within this class the commission must of course determine . . .[101]

The project for international arbitral tribunals and their procedure presented by Dr. Goldschmidt to the Institut de Droit International in 1874 averred that arbitral tribunals have jurisdiction to determine their own competence.[102] A similar provision was inserted by Blüntschli in his proposed international code.[103]

[101] This letter was dated June 28, 1895. Moore, J. B., *A Digest of International Law,* Washington, 1906, Vol. 7, pp. 34-35.

[102] See the project in 6 *Revue de droit international et de législation comparée* (1874), p. 421. Article 18 (p. 440) reads as follows: "Le tribunal arbitral est juge de sa compétence. Si l'exception d'incompétence n'est pas opposée au premier moment opportun ou si, l'exception opposée en temps utile ayant été repoussée par le tribunal arbitral, les parties passent outre sans faire réserves, toute contestation ultérieure de la compétence est exclue."

[103] Blüntschli, M., *Le droit international codifié,* 3d ed., Paris, 1881, Art. 492 *bis:* "Le tribunal arbitral statue sur l'interprétation du compromis entre les parties et par conséquant sur sa propre compétence."

Fiore, the foremost of Italian writers on international law in the nineteenth century, held that the power to decide its own jurisdiction belongs, by necessity, to an arbitral tribunal, as to any ordinary court of justice.[104]

Mérignhac is universally recognized as one of the most competent and most substantial writers on international arbitration. He is extremely cautious in examining the problems of arbitration; he states the law as it is and not as it should be. Yet he does not hesitate to state that the question of jurisdiction is one to be decided by the tribunal itself; otherwise, he says, the arbitral tribunal would be deprived of dealing with the case whenever any of the parties demurred to its jurisdiction, even if the case fell clearly within the categories provided for in the *compromis*.[105]

Professor Lammasch pointed out that a denial of this power would make it possible for either of the parties to obstruct the functioning of arbitral tribunals whenever a plea

[104] Fiore, Pasquale, *Nouveau droit international public,* 2d ed., Paris, 1885, Vol. 2, p. 641, § 1213. "Le tribunal arbitral a le droit de statuer sur sa propre compétence, de la même manière que tout tribunal même d'exception est autorisé à le faire par la nature même de sa mission. C'est, en effet, un attribut naturel de toute autorité que l'affirmation de ses pouvoirs. Il est aussi certain que la règle de droit commun, que le juge de l'action est aussi juge de l'exception, doit être applicable devant le tribunal arbitral. On ne pourrait dès lors pas réfuser à ce tribunal la compétence nécessaire pour statuer sur toutes les contestations qui pourraient être soulevées par l'une ou l'autre des parties, même en ce qui concerne les mesures d'instruction qu'il aurait ordonnées, et l'exécution de ces mesures . . ."

[105] Mérignhac, A., *Traité théorique et pratique de l'arbitrage international,* Paris, 1895, p. 254, § 257. "Que faut-il penser d'une exception d'incompétence soulevée devant le tribunal arbitral? Si, en disant que les arbitres sont juges de leur compétence, on veut entendre qu'ils ont le droit de décider qu'une difficulté que l'on veut soustraire à leur examen rentre ou non dans les termes du compromis, on émet certainement une vérité incontestable. L'arbitre constitué juge du fond doit en effet, *ipso facto,* être considéré comme investi du droit de déterminer en quoi il consiste; s'il en était autrement, il serait obligé de se dessaisir dès qu'une partie élèverait la prétention qu'il ne peut connaître d'une question, alors même que celle-ci serait comprise d'une manière évidente dans le traité. L'arbitre a donc le droit de décider quels sont les points qui rentrent ou non dans le compromis et qu'il peut dès lors ou non juger; ce n'est pas question de compétence, mais question de fond; et ceci est vrai devant la juridiction ordinaire comme devant le tribunal international . . ."

to the jurisdiction is filed.[106] The necessity of granting such powers to international tribunals is even more strongly emphasized by Messrs. de Lapradelle and Politis. In the *Note doctrinale* concerning the *Betsey* case it is pointed out that the renunciation of the power to decide their competence would restrict the independence of judges of international courts; it would put arbitration under tutelage, with the consequence that incompetence would have to be admitted whenever a plea to the jurisdiction is entered.[107] In the face of this doctrine expressed by him, it is interesting to note that in the present Rumanian-Hungarian dispute, as counsel for Rumania, M. Politis is pleading that the Mixed Arbitral Tribunal has no jurisdiction to determine its competency.

The principle that international tribunals have the power to determine their own jurisdiction has been inserted in several statutes establishing such tribunals. The Hague Convention for the Pacific Settlement of International Disputes, of July 29, 1899, created the Permanent Court of Arbitration. Article 48 of this Convention, reproduced in Article 73 of the Convention of October 18, 1907, provided that "The

[106] Lammasch, Heinrich, *Die Rechtskraft internationaler Rechtsprüche*, Publications de l'Institut Nobel Norvegien, Vol. 2, Fasc. 2, Kristiania, 1913, Sec. 16, p. 67: "Die Entscheidung darüber, auf welche tatsächliche Fragen der Spruch des Schiedsgerichtes auf Grund des Kompromisses sich zu erstrecken habe, muss dem Schiedsgerichte selbst überlassen werden. Der Umstand, dass eine Partei die Kompetenz des Schiedsgerichtes bestreitet, einen Punkt in seine Entscheidung einzubeziehen, kann . . . diesen Punkt nicht aus dem Machtbereiche des Schiedsrichters ausscheiden. Wenn es anders wäre, müsste er ja jederzeit seine Tätigkeit einstellen, wenn eine Partei sie in noch so unbegründeter Weise beschränken wollte . . ."

[107] Lapradelle, A. de—Politis, N., *Recueil des Arbitrages Internationaux*, Vol. 1, Paris, 1905, pp. 103-5: ". . . permettre aux parties d'élever l'exception sans en faire juge le tribunal, c'est leur permettre de s'evader purement et simplement du litige et faire aussi des plaideurs, ou plus exactement de l'un d'eux, le maître souverain des pouvoirs du tribunal . . . Refuser à l'arbitre le droit de statuer sur sa propre compétence, c'est . . . restreindre les arbitres dans leur indépendence et les atteindre dans leur dignité . . . Dire que le juge international ne peut pas statuer sur l'exception d'incompétence, c'est répondre, en définitive, qu'à chaque fois que cette exception se présente, il doit l'admettre. Forcer les juges à renvoyer le litige aux parties, c'est mettre l'arbitrage en tutelle et, de cette tutelle, choisir la partie la pire de toutes: celle des plaideurs . . ."

Tribunal is authorized to declare its competence in interpreting the *compromis,* as well as the other treaties which may be invoked, and in applying the principles of law." [108] Several of the arbitration treaties expressly stipulate that the determination of jurisdiction is reserved to the tribunal itself.[109]

A Special Agreement was concluded between the United States and Great Britain on August 18, 1910, for the submission to arbitration of certain pecuniary claims.[110] The first schedule of claims to be dealt with were agreed upon on July 6, 1911, and in the terms of submission the following provision is to be found with regard to the Tribunal's power to determine its jurisdiction:

> In case of any claim being put forward by one party which is alleged by the other party to be barred by treaty, the Arbitral Tribunal shall first deal with and decide the question whether the claim is so barred . . .[111]

The Mixed Claims Commission, established in pursuance of the Agreement of August 10, 1922, between the United States and Germany, in its Administrative Decision No. 2, sets forth its power to adjudicate its jurisdiction in the following terms:

> . . . at the threshold of the consideration of each claim is presented the question of jurisdiction, which obviously the Commission must determine preliminarily to fixing the amount of Germany's financial obligations, if any, in each case. . . . The Commission's task is to apply the terms of the Treaty of Berlin to each case presented, decide those which it holds are within its jurisdiction, and dismiss all others . . .[112]

[108] United States Foreign Relations, 1907, Pt. II, p. 1195.

[109] See, for instance, the Italo-Argentine Arbitration Treaty of September 18, 1907, British and Foreign State Papers, Vol. 101, p. 239. Article 1: ". . . La question de savoir si une contestation constitue ou non un différend prévu aux numéros 1 et 2 ci-dessus sera également soumise à l'arbitrage . . ."

[110] British and Foreign State Papers, Vol. 103, p. 322.

[111] *Ibid.,* p. 328.

[112] Mixed Claims Commission, United States and Germany, Administrative Decision No. 2, dealing with the functions of the Commission and announcing fundamental rules of decision. November 1, 1923, pp. 6-7.

A similar rule of procedure was adopted by the Tripartite Claims Commission established under the agreement between the United States, Austria and Hungary,[113] in its Administrative Decision No. 1.[114]

If any doubt remained as to the recognition of this principle, one could find conclusive proof in the Statute of the Permanent Court of International Justice. Article 36 of the Statute stipulates, among other things, that "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

The framers of the Statute of the Court were international jurists of wide knowledge whose names alone are sufficient guarantee that they laid down rules in conformity with existing international law and practice. They must have been convinced that in the interest of the administration of international justice it is necessary that an international court be given power to decide its jurisdiction. They also must have had the conviction that the granting of such a power is consistent with international law and custom regarding international courts and arbitral tribunals. In view of the fact that power to determine competence was granted to the Permanent Court of Arbitration, to the Permanent Court of International Justice, and to other tribunals established by bi-lateral arbitration treaties, it is scarcely conceivable that the same power will be denied to the Mixed Arbitral Tribunals instituted by the Peace Treaties. It seems reasonable to maintain that those Tribunals were molded with the intention to "take cognizance of the subject-matter of a litigation and . . . to legally hear, try and determine issues, and render judgment according to the general rules of law," [115] just as all other arbitral tribunals

[113] Signed on November 26, 1924; became effective by the exchange of ratifications on December 12, 1925. United States Treaty Series, No. 730.

[114] Tripartite Claims Commission (United States, Austria and Hungary) Administrative Decision No. 1, announcing definitions and general governing principles and dealing with the functions and jurisdiction of the Commission. May 25, 1927, p. 8.

[115] *Supra,* note 96.

were created. In order to do so, the tribunal must have the power to determine its competence.

The Rumanian-Hungarian Mixed Arbitral Tribunal in its decision of January 10, 1927, declared itself competent. According to Article 239, section *g*, of the Treaty of Trianon, this decision was final and conclusive, whether it referred to the jurisdiction of the Tribunal or to the merits of the case, for Article 239 makes no distinction with respect to this matter. The decision should have been accepted by Roumania. Let us next consider the reasons given by the Rumanian government to the Council of the League as an explanation and justification of their interruption of the functioning of the Tribunal by the recall of its arbitrator. We must also examine the action taken by Hungary upon the recall of the Rumanian arbitrator, and the manner in which the Council attacked the task incumbent upon it by virtue of the Covenant and the Treaty.

Chapter IV

THE DECISION OF THE RUMANIAN-HUNGARIAN MIXED ARBITRAL TRIBUNAL BEFORE THE COUNCIL OF THE LEAGUE OF NATIONS

The Appointment of the Committee of Three

The request of the Rumanian government to the League under Article 11, paragraph 2, of the Covenant was placed on the agenda of the forty-fourth session of the Council, held at Geneva in March, 1927. Thus the dispute was brought a second time before the Council. This time, however, an entirely different aspect of the case was to be considered. Previously the Council concerned itself with a request to enjoin Rumania's continued taking of land under her agrarian law and in violation of the treaty rights of Hungarian nationals. Under the present appeal, however, the Council was asked by Rumania to consider the jurisdiction of a Mixed Arbitral Tribunal whose competence to hear agrarian cases had just been adjudicated by that Tribunal, the decision rendered being unfavorable to the Rumanian contention. At the Council meeting of March 7, 1927, M. Titulesco, the Rumanian representative, explained the reasons which, in his estimation, justified the attitude taken by his government regarding the above-mentioned decision of the Mixed Arbitral Tribunal.

He asserted that "the object of the Rumanian government is to prevent a question which has already been settled four times from being reopened a fifth time."[116] These four settlements, in his conception, were made: first, by the Hungarian government at the Peace Conference;[117] second, by

[116] For the discussion in the Council Meeting of March 7, 1927, see: League of Nations Official Journal, Vol. 8, No. 4, pp. 350-72.

[117] M. Titulesco refers to the memorandum of the Hungarian government to the Peace Conference, quoted in Chapter I, pp. 13-15.

the Brussels "agreement"; third, by the Council of the League on the basis of that "agreement"; finally, by the Rumanian courts which had given final awards in suits brought freely by Hungarian optants. M. Titulesco contended that the Mixed Arbitral Tribunal had no jurisdiction over claims arising out of the application of the Rumanian agrarian law to Hungarian nationals and that in assuming jurisdiction over such claims the Tribunal exceeded its powers as defined by the treaty. He asserted that the Tribunal in declaring its competence and requiring Rumania to answer on the merits, reopened the question of the incompatibility of the agrarian law with the treaties; that such action would expose Rumania to the danger of social upheaval; that the withdrawal of her judge from the Tribunal was a necessary step toward the protection of her vital interests; that, therefore, the Rumanian government felt it its duty to notify the League of the reasons for its action and to call the attention of the Council to the decision of the Tribunal as a circumstance which might endanger peace.[118]

Mr. Gajzágó, answering on behalf of the Hungarian government, said that the decision of the Tribunal in regard to its competence in no way endangered peace, and that there was no reason for Rumania to invoke Article 11, paragraph 2, of the Covenant. "I have the honour to declare solemnly," said Mr. Gajzágó, "that neither the good understanding between Rumania and Hungary nor peace in general is threatened by the fact that the Rumano-Hungarian Mixed Arbitral Tribunal has done the duty laid upon it by treaties and has recognized the necessity of examining twenty-two cases. . . ." [119]

If good understanding was at all troubled, this was due, said Mr. Gajzágó, to the attitude taken by Rumania in disregarding the decision of an arbitral tribunal—an attitude for

[118] See the exposé of M. Titulesco in League of Nations Official Journal, Vol. 8, No. 4, pp. 350-364.

[119] League of Nations Official Journal, Vol. 8, No. 4, p. 366.

which Rumania, by invoking Article 11 of the Covenant, sought to obtain the sanction of the League of Nations. Hungary would, he declared, have been more justified than was Rumania in appealing to the Council under Article 11 of the Covenant, because of the withdrawal of the Rumanian arbitrator. He furthermore contended that the Council as a political body could not interfere with the judicial decision of an international court such as a Mixed Arbitral Tribunal; that the theory of Rumania—that the decision of January 10, 1927, was null because in giving such a decision the Tribunal exceeded its powers—would, if adopted, be a perilous means "to impede the course of justice on the pretext that an award was vitiated by an abuse or usurpation of powers." "The accusation of an abuse of powers," he continued, "could only be seriously considered if Rumania would agree that the question whether the Rumano-Hungarian Mixed Arbitral Tribunal had or had not exceeded its powers in the twenty-two awards in question should be referred, on the basis of a special agreement, to the Permanent Court of International Justice, which should decide it by a judgment." [120]

Mr. Gajzágó concluded by calling to the attention of the Council Article 239 of the Treaty of Trianon, "which assigned to the Council of the League of Nations the weighty task of completing the organization of the Mixed Arbitral Tribunals whenever one of these Courts should be without a president or when one of the international arbiters should be prevented or should decline to sit when a case comes up for decision." [121] He, therefore, requested the Council to appoint two neutral deputy arbitrators, in accordance with the provisions of Article 239, paragraph *a*, and of the Annex to that article; and he submitted, to this effect, the following resolution:

> The Council of the League of Nations, having heard the statements of the Rumanian and Hungarian delegates, notes that Rumania

[120] *Ibid.*, p. 369.
[121] *Ibid.*, p. 370.

has decided to withdraw her national arbitrator from the Rumano-Hungarian Mixed Arbitral Tribunal whenever the latter is called upon to decide an agrarian case, and that, in this event, the Tribunal cannot sit—a position which is inadmissible; appoints, in accordance with its practice and with the provisions of the treaties, two nationals of States which remained neutral during the war to act as deputy-arbitrators in order that, in default of the national arbitrator of the opposing State, each State may be able to select a substitute; and proceeds to the agenda.[122]

The statements of the representatives of Rumania and Hungary resulted in a proposal by Dr. Stresemann, chairman of the forty-fourth session of the Council, that a Committee be appointed to study the question. The Council asked Sir Austen Chamberlain to serve as chairman; Viscount Ishii and M. Villegas, representatives of Japan and Chile respectively, were appointed as members. The Committee was to investigate the dispute and to report, at a subsequent meeting of the Council, upon the possibility of an amicable adjustment.

The Request of the Hungarian Government to the Council, for the Appointment of Substitute Arbitrators [123]

The oral request made by the Hungarian representative at the Council meeting of March 7, 1927, for the appointment of substitute arbitrators, was formally submitted by the Hungarian government in an application dated May 21, 1927, addressed to the Secretary-General of the League.

The application requested the Council "to appoint at its next session, in virtue of Article 239 of the Treaty of Trianon, two deputy arbitrators, to be selected from among nationals of Powers which remained neutral during the world war." In support of this request, the application cited instances in which substitute judges had been designated by the

[122] *Ibid.*, p. 370. The request of the Hungarian government for the appointment of deputy-arbitrators was formally submitted to the League in a note dated May 21, 1927, addressed to the Secretary-General of the League.

[123] See the full text of the request printed in Appendix VII.

Council for several Mixed Arbitral Tribunals, in conformity with the above-mentioned article of the Treaty of Trianon and with identical articles of the Treaties of Saint-Germain and Neuilly. The withdrawal of the Rumanian arbitrator, in the estimation of the Hungarian government, presented a more serious case than any of those cited, because "Rumania has withdrawn her arbitrator with the deliberate object of preventing arbitration in a specific series of cases in which the Tribunal has already decided certain points of detail in a manner unfavorable to the Rumanian case."

The application then answered point by point the criticisms of the decision of the Mixed Arbitral Tribunal by the Rumanian representative at the Council's meeting of March 7, 1927. It pointed out that Rumania's attitude towards the decision of the Tribunal "is threatening to call in question the fundamental principles which underlie international justice in general, and the practice unanimously established, in the special matter of 'liquidation' and the protection of the private property of aliens, by all the Mixed Arbitral Tribunals (of which there are about forty), by the Permanent Court of Arbitration, and by the Permanent Court of International Justice." As to the Rumanian allegation that the twenty-two awards rendered by the Rumanian-Hungarian Mixed Arbitral Tribunal on January 10, 1927, failed to consider the incompatibility of the agrarian law with the treaties, the Hungarian application expressed the view that this alleged defect was in fact a virtue, since problems connected with the merits of a case could not be settled in awards on the question of jurisdiction.

A large part of the application was devoted to the refutation of the point insisted upon by counsel for Rumania before the Tribunal, and reiterated by M. Titulesco before the Council, namely, that the dispute was settled conclusively by the Brussels "agreement." It was pointed out that the minutes of the Brussels Conversations, which were alleged to constitute the "agreement," were never initialed, although one part

of the second instrument—the draft-resolution presented by Mr. Adatci—does bear the initials of the representatives. The application especially stressed the fact that this draft-resolution, one paragraph of which was initialed, was originally presented at a place different from that at which the Conversations took place, and at a date subsequent to the termination of negotiations, after all persons present had admitted that no agreement could be reached on the fundamental problem.

The application concluded that there was no occasion to invoke Article 11 of the Covenant, but that deputy arbitrators should be appointed in conformity with the Treaty. "To refuse to appoint deputy arbitrators, or to subordinate such appointment to any condition, would," declared the application, "be to subject the awards of the Mixed Arbitral Tribunal to supervision by the League—and that would be a serious violation of the treaties."

In an additional letter to the Secretary-General, dated May 24, 1927, Mr. Gajzágó transmitted the information that, according to the official returns furnished to the Reparation Commission, movable property to the amount of one hundred and ten million pounds sterling (five hundred and forty-five million dollars) was requisitioned and carried off from present Hungarian territory by Rumania during her unauthorized occupation of that territory in 1919-20. "This sum," writes Mr. Gajzágó, "therefore is not equal to, but seventeen times greater than, the amount which would suffice to meet the pecuniary claims of the Hungarian petitioners who have suffered as a result of the liquidations carried out in Transylvania in the name of agrarian reform. . . ." Dismembered Hungary survived this extremely heavy loss in her national wealth. Thus, Mr. Gajzágó asserted, the argument put forward by Rumania, that the compensation claimed by Hungarian nationals would ruin the finances of the country, could not hold. Nor could Hungary renounce the right conferred by the treaty upon her nationals and their property. "It should,"

he said, "be remembered that the Hungarian Government obtained from the Hungarian National Assembly the ratification of a treaty which exacted the sacrifice of two-thirds of its territory and two-thirds of its population, solely by laying stress upon those provisions of the Treaty which guaranteed the material and moral interests of Hungarian nationals thus ceded. One of the most important of these provisions was Article 250, which was perhaps the only article that the Austrian and Hungarian Peace Delegations were able to obtain as an amendment to the draft treaties, in view of the great danger to which these interests were exposed under the very eyes of the Peace Conference."

"Since Rumania questions the rights of Hungarian nationals," concluded Mr. Gajzágó, "it is of primary importance to allow the competent judicial authority set up by the Treaty to deal with such disputes freely, and to decide whether, and if so, in what individual cases, and to what extent, these rights exist." [124]

The Work of the Committee of Three

At the Council Meeting of June, 1927, Sir Austen Chamberlain reported, on behalf of the Committee of Three, that the representatives of the Hungarian and Rumanian governments had been summoned before a meeting of the Committee held in London on May 31 and June 1, 1927, and that several proposals and suggestions of the Committee had at that time been transmitted to the delegates. At the request of the Committee, the Council postponed discussion of the dispute to the next session,[125] thus enabling the representatives of Hungary and Rumania to communicate with their governments with respect to the consideration of these proposals.[126] The con-

[124] The application of the Hungarian government of May 21, 1927, and the additional letter of Mr. Gajzágó of May 24, 1927, have not been published in the League of Nations Official Journal. References to and quotations from these documents have been taken from the original French MS.

[125] The next session was scheduled to be held in September, 1927.

[126] League of Nations Official Journal, Vol. 8, No. 7, p. 790.

versations conducted in London and during the Council meeting were confidential; no records of these sessions have yet been released.

The Committee of Three met again early in September, in Geneva. As a result of further deliberations by their governments, the Hungarian and Rumanian representatives, respectively, submitted proposals to the Committee which, they thought, would serve as a basis for the amicable adjustment of the dispute. The Hungarian memorandum, dated September 2, 1927, reads as follows:

At its March and June meetings the Council did not nominate substitute arbitrators to the Rumanian-Hungarian Mixed Arbitral Tribunal, after Rumania had recalled her national arbitrator from this Tribunal in all agrarian cases.

By a resolution of adjournment, brought in its meeting of June 16, 1927, at the proposal of the Committee of Reporters, the Council invited the two interested Governments to submit the question to new deliberations.

The Hungarian Government, having discharged this task, arrived —after studying the question thoroughly—at the following result:

Its representative to the Council had already offered to Rumania, at the March meeting, the arbitration of the League of Nations' Permanent Court of International Justice, which body—on the basis of a special convention to be concluded between the two States —should decide the question whether the Rumanian-Hungarian Mixed Arbitral Tribunal had exceeded its powers, thus rendering its decisions null and void.

In due order this offer of a new arbitration should have come from that party which charged that the powers had been transgressed. By undertaking to make the offer, the Hungarian representative signified a strong spirit of conciliation.

This offer demands the solution of the problem by the highest authority in matters of international jurisdiction, i.e., by the League of Nations' Permanent Court of International Justice, and it is, therefore, apt to be satisfactory to the whole world. Contrary to other proposed solutions, this offer also has the great advantage of not demand-

ing or involving the modification of any stipulation of the Treaties, being applicable independently of them.

Animated by a high spirit of conciliation, of justice, and of respect towards the Treaties, Hungary has the honor again to offer to Rumania the same supplementary arbitration of the Permanent Court of International Justice, the more so, because Rumania has not yet given a definite answer to this offer.

Hungary chooses this procedure on her own initiative, but at the same time in conformity with the high obligations incumbent upon her as a member of the League of Nations, by virtue of the Preamble and Article 13 of the Covenant. Hungary hopes that Rumania will not remain indifferent to those same provisions of the Covenant of the League of Nations.

The Hungarian Delegation to the present session of the Council has the honor to present herewith a draft of a convention corresponding to the above expressed offer of arbitration.[127]

The draft-convention is worded as follows:

The two High Contracting Parties have agreed to submit the following question to the decision of the Permanent Court of International Justice:

"Did the Rumanian-Hungarian Mixed Arbitral Tribunal, in declaring itself competent in its decisions delivered on January 10, 1927, in twenty-two agrarian cases (Emeric Kulin Senior, and others) pending between Hungarian nationals and the Rumanian State, exceed its powers, thus entitling Rumania to refuse to recognize the decisions delivered by the Mixed Arbitral Tribunal in those matters, and to withdraw from the Mixed Arbitral Tribunal her national arbitrator in all cases where a similar question should arise between Hungarian nationals and the Rumanian State?"

The High Contracting Parties undertake without any restrictions or reservations to conform their attitude strictly in everything which concerns the activity of the Rumanian-Hungarian Mixed Arbitral tribunal to the decision of the Permanent Court of International Justice.

[127] The above-quoted written propositions of the Hungarian representative, the Rumanian proposal, and the answer of the Hungarians to the latter, referred to below, have not been published in any official document. References are made to and quotations are taken from the original French MS. text. Author's translation.

To this written proposal submitted to the Committee of Three on behalf of the Hungarian government, the Hungarian representative added that his government would not press claims aiming at the restitution of property *in natura* where such property had already been allotted to Rumanian peasants —a question on which M. Titulesco had laid special emphasis, claiming that it might cause social upheaval. Instead, Hungary was willing to negotiate with the Rumanian government regarding the indemnity to be paid for such land allotments.

The Rumanian representative simultaneously submitted to the Committee of Three proposals of his government aiming to overcome the difficulties, upon the ground of the following principles and suggestions:

1. Impossibility to judge the Rumanian agrarian laws or to interfere with their disposition.
2. The Tribunal is only empowered to judge liquidations prohibited by Article 250 of the Treaty and not every violation of international law.
3. The liquidation prohibited by Article 250 is the one mentioned in Article 232, paragraph *b*. The purpose of such liquidation is to proceed to the application of exceptional war-measures directed against the property of ex-enemies as such to obtain reparation.
4. The Tribunal will be composed of five members, three members being neutrals, one a Hungarian and one a Rumanian.
5. Keeping in view the above dispositions, the parties maintain the right to invoke any other exception or means of defense.
6. Coincidence in the execution of the contingent obligations of Rumania and of the financial obligations incumbent on Hungary under the provisions of the Treaty.

The Rumanian proposal was communicated by the Committee of Three to the Hungarian delegates. In a letter dated September 4, 1927, M. Walkó, Hungarian Minister of Foreign Affairs, informed Sir Austen Chamberlain that his government was unable to accept this proposal. In a memorandum annexed to the letter, answer was given to the six

suggestions made by Rumania. M. Walkó's letter and the memorandum read as follows:

Geneva, September 4, 1927

Mr. Secretary of State:

By your letter of September 2, Your Excellency informed me of the propositions made by the representative of Rumania with regard to Hungary's request concerning the designation by the Council—by virtue of Article 239 of the Treaty of Trianon—of two substitute arbitrators to the Hungarian-Rumanian Mixed Arbitral Tribunal.

I sincerely regret that I am obliged to inform Your Excellency that after a thorough examination of the propositions of the Rumanian representative, I have arrived at the conclusion that it is impossible for me to accept these propositions as a basis of subsequent discussions, and this for the reasons expressed in the annex to the present letter.

On this occasion I repeat that I abide by my proposal made in the name of the Royal Government on the second of September inst., a proposal tending to regulate the alleged usurpation of power by the Permanent Court of International Justice.

Asking you to inform your honorable colleagues of the Committee of Three of this communication, I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

Walkó

Annex

The Hungarian Government strictly abides by the Treaty of Trianon.

The majority of the propositions of the Rumanian representative would lead to grave modifications of the Treaty, while the rest either contain repetitions, or interpretations of its provisions, which are in many respects inexact.

Modifications of the Treaty are inadmissible, while repetitions would not only be useless, but dangerous, and the interpretations of the stipulations in question fall under the jurisdiction of the Mixed Arbitral Tribunals instituted by Treaties for this very purpose.

For these reasons the Hungarian Government is not in a position to accept the propositions in question as the basis of discussions. Furthermore, if closely examined, the propositions refute themselves.

Ad. 1. The authority of the Rumanian agrarian law is not in

question. "Impossibility to judge the agrarian law" as declared in the proposition would mean: preventing the Tribunal from examining whether in certain cases subject to its jurisdiction the application of the agrarian laws is, or is not, in contradiction with conventional rights defined by the Treaties. It seems evident that such an interdiction is inadmissible. Cases of conflict between national law and conventional stipulations are always possible, and in such cases conventional rights must prevail. There is no reason why the Rumanian agrarian law should not fall under this rule. That the Treaty itself foresees such possible contradictions between its provisions and national laws as far as "measures" and "liquidation" are concerned, clearly results, among other things, from the following passage of paragraph 3 of the Annex to Article 232 of the Peace Treaty which reads:

"In Article 232 and its Annex the expression 'exceptional war measures' includes measures of all kinds, *legislative,* administrative, judicial or others, that have been taken *or will be taken hereafter* with regard to enemy property . . . measures which have had or will have as an object the seizure of, *the use of,* or the interference with enemy assets, for whatsoever motive under whatsoever form."

The possibility of a conflict between national law and conventional rights in the case which interests us is thus stated by the Treaty itself, and if such a conflict is stated to exist by one of the parties, only the judge is competent to decide upon the question and to determine it accordingly. Not only is he entitled to act thus, but it is also his duty under the terms of the Treaty. To try to prevent his performing it would be to limit his mandate; but the Treaty knows nothing of such a limitation, which would be in direct opposition with its provisions. It is therefore forbidden us even to take into consideration such a course of action.

Ad. 2. It was never contended that the Mixed Arbitral Tribunal will be called upon to judge every violation of international law. The conventional provisions which fall under the jurisdiction of the Mixed Arbitral Tribunal are exactly indicated in the Treaty. But every conventional clause is necessarily based upon a series of general principles of common law. Without these general principles the application of the conventional clauses would be impossible.

Ad. 3. Article 250 speaks not only of "liquidation" but also of "sequestration"—that is to say, "of any measure of this kind or other

measure of transfer, compulsory administration or sequestration." Paragraph *b* of Article 232 is not the only passage to which Article 250 refers, because this Article refers to the *whole* of Article 232 and its Annex. Moreover, according to Article 232 and its Annex, neither the purpose of the "liquidation" or of the "measure" respectively, nor the utilization of its proceeds forms any part of the notion itself. Apart from reparation, paragraph *h* of Article 232 enumerates a list of purposes served by the proceeds of sales of liquidated enemy property, and in addition there is the liquidation of elimination, in paragraph *i* of Article 232. Article 250 forbids all these categories. On the other hand, the expression "affecting ex-enemy assets as such" can be found nowhere in the Treaty. The proposition in question would thus eliminate a great part of the text of the Treaty and would add new terminology.

Ad. 4. The increasing of the number of the members of the Mixed Arbitral Tribunal from three to five would also represent an important modification of the Treaty.

Ad. 5. This clause, expressing only a general rule of every procedure, seems to be superfluous.

Ad. 6. This seems to refer to Hungary's financial obligations towards the Allied Governments. These obligations are regulated by the decision of the Reparation Commission, delivered February 21, 1924. The Hungarian Government is not even informed concerning the distribution of the sums paid by Hungary, and the Rumanian quota.

Moreover, the Hungarian Government could not concede that claims of Hungarian *private persons* against Rumania should in any way be related to claims raised against the Hungarian *State.*

The rejection of the Rumanian proposals by the Hungarian government excluded the possibility of the settlement of the dispute by means of direct agreement between the parties. The Committee of Three, therefore, proceeded to draft a report to the Council recommending, on the strength of its investigation and irrespective of the concurrence of the parties, solutions which it deemed suitable for an amicable adjustment of the controversy.

The Report of the Committee of Three [128]

The problem put to the Council and referred to the Committee of Three was certainly a delicate and complicated one, especially as it was necessary to approach its solution from two different angles. There was the request of the Rumanian government regarding the withdrawal of the Rumanian judge from the Mixed Arbitral Tribunal—a request presented under paragraph 2 of Article 11 of the Covenant and invoking the mediation of the Council in a case threatening the good understanding between nations. On the other hand, there was the request of the Hungarian government for the appointment by the Council of two deputy judges for the same Tribunal, by virtue of Article 239 of the Treaty of Trianon—a request calling upon the League in its capacity of preserver and guardian of the Treaties.

The report of Sir Austen Chamberlain and his committee was presented to the Council at the first meeting of its forty-seventh session, held on September 17, 1927.[129] It begins with a short historical survey of the dispute. Thereafter the Committee states with regret that the several proposals submitted by it to the parties met with refusals and failed to bring about a solution through direct conciliation. The report continues:

> The Committee was, therefore, obliged to seek a solution by other methods. A minute examination of the question of the Mixed Arbitral Tribunal's jurisdiction seemed to be of primary importance. It therefore asked the following questions:
>
> 1. Is the Rumano-Hungarian Mixed Arbitral Tribunal entitled to entertain claims arising out of the application of the Rumanian agrarian law to Hungarian optants and nationals?
>
> 2. If the answer to that question be in the affirmative, to what extent and in what circumstances is it entitled to do so?

[128] See the full text of the report printed in Appendix VIII.

[129] Document C. 489. 1927. VII. League of Nations Official Journal, Vol. 8, No. 10, pp. 1379-83. The report is printed in full in Appendix VIII.

The Committee then proceeds to define the limits and extent of the jurisdiction of the Tribunal, as viewed by it in interpreting the Treaty which established the Tribunal. After having examined the above questions, and after having asked the opinion of "eminent legal authorities," the Committee came to the conclusion that

> . . . the claim of a Hungarian national for restitution of property in accordance with Article 250 might come within the jurisdiction of the Mixed Arbitral Tribunal even if the claim arises out of the application of the Rumanian agrarian law . . .

Nevertheless, the report lays down three theses as "the definition of principles which the acceptance of the Treaty of Trianon has made obligatory for Rumania and Hungary." The Committee thought that:

> 1. The provisions of the peace settlement effected after the war of 1914-18 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.
>
> 2. There must be no inequality between Rumanians and Hungarians, either in the terms of the agrarian law or in the way in which it is enforced.
>
> 3. The words "retention and liquidation" mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.

The Committee suggested that the Council should

> (a) request the two parties to conform to the three principles enumerated above;
>
> (b) request Rumania to reinstate her judge on the Mixed Arbitral Tribunal.

The report concludes by recommending alternative sanctions in case either or both of the parties should refuse to

accept these proposals. These recommendations are in substance as follows:

1. In case of refusal by Hungary, the Council would not be justified in proceeding to the nomination of substitute judges in conformity with the Treaty of Trianon.
2. In case of refusal by Rumania, the Council would be justified in taking the necessary steps to assure the functioning of the Mixed Arbitral Tribunal.
3. If both parties refuse, the Committee thinks that the Council has exhausted the rôle incumbent on it by Article 11 of the Covenant.

The real significance of this report was made apparent by the fact that the discussion over the principles and suggestions contained in it occupied fully the first four meetings of the Council.[130] Count Apponyi, in a clearly conceived address, set forth the arguments upon which the Hungarian government concluded that it cannot adhere to the principles and recommendations offered by the Committee of Three. Count Apponyi took the position that the decision of the Rumanian-Hungarian Mixed Arbitral Tribunal is final according to the Treaty of Trianon; it is a *res judicata* upon which his government cannot enter into any dispute. He asserted that the appointment of deputy judges to fill the place of the recalled Rumanian arbitrator is a duty imposed on the Council by the Treaty, which duty cannot be called into question. Count Apponyi proceeded to a criticism of the report of the Committee of Three. In his estimation the investigation as to the competence of the Mixed Arbitral Tribunal has scientific value only, as the competence itself is *res judicata* and not subject to reconsideration. He pointed out that he was unable to discover any connection between the Treaty of Trianon and the three principles laid down in the report. Furthermore, he

[130] For the discussions before the Council, see League of Nations Official Journal, Vol. 8, No. 10, pp. 1383-1414.

asserted, those principles are not even in conformity with the principles of international law. He said in addition that the Council as a body politic has no right to assume legal functions such as the interpretation of treaties. Such a course would endanger the cause of international arbitration, a cause to foster which is one of the most important purposes of the League. Lastly, Count Apponyi protested against the "sanctions" recommended by the report in case of refusal by the parties to adhere to the suggestions of the Committee of Three.

M. Titulesco was willing to accept the report for Rumania. In the ensuing discussion, lasting through three long meetings of the Council, it became evident that the members of the Council are by no means unanimous as to the soundness of the principles laid down by the Committee of Three—much less as to the wisdom of recommending sanctions. The representative of Germany even suggested that the three principles, if not voluntarily accepted by the parties, be referred for an advisory opinion to the Permanent Court of International Justice. M. Scialoja, representing Italy, spoke firmly against the proposed sanctions. M. Loudon, of the Netherlands, stated that his country would prefer to see the legal questions involved settled by a legal forum.

Finally, the acceptance of the first part of the report, excluding the sanctions, was suggested. The President, M. Villegas (Chile), at the morning meeting of September 19, 1927, proposed that

> . . . the Council should, in discussing the proposal of the Committee of Three, exclude the second part, namely, the consequences which would arise through the acceptance or non-acceptance of the recommendations made to the two parties. If we could thereby reach a unanimous acceptance of the recommendations, we could attach to them a request that the representatives of the two parties should bring these recommendations to the knowledge of their Governments together with the discussions which have here taken place. The two Governments would then be in a position to inform the members of the Council of their

decision through the Secretariat of the League before the December session, furnishing them at the same time, if they so desire, with a detailed statement of their arguments. Should the decision of one of the Governments be negative, the Council would be in a position in December to take any measures required after taking into account the arguments presented to it . . .[131]

The firm stand of Count Apponyi, which evoked bitter words from Sir Austen Chamberlain during the heat of the discussions, led the Council to see that it would be unwise to impose the report and its conclusions upon the parties in view of the refusal of one of them to adhere to it. The afternoon meeting of September 19, 1927, closed with the acceptance of the President's proposal; the report of the Committee of Three was, with the exclusion of the sanctions, adopted by the Council, the representatives of the two interested states not having been permitted to vote. The report thus adopted was transmitted to the consideration of the Hungarian and Rumanian governments, which were asked to conform to its principles and to give an answer before the December session of the Council, until which time the discussion was adjourned.

Analysis of the Report

The report of Sir Austen Chamberlain and his committee not only aroused discussion within the Council; it aroused the attention of international jurists and became the subject of study and criticism by eminent writers on international law. A glance at the voluminous material printed within a few months after the publication of the report will suffice to prove that the Rumanian-Hungarian dispute rapidly outgrew the stage of being a local controversy between two neighboring countries.[132] The very fact of this sudden and widespread

[131] *Ibid.*, p. 1404.

[132] Of the numerous articles published on the subject, the followings should be referred to: Dupuis, Ch., "Le différend roumano-hongrois au Conseil de la Société des Nations en septembre 1927," 1, *Revue de droit international*, 1927, pp. 893-961; Unden, Osten, "Le différend roumano-hongrois, devant le Conseil de la Société des Nations en septembre, 1927," *ibid.*, pp. 746-54; Sibert, Marcel, "Une

interest makes paramount a careful analysis of certain statements and principles enumerated in the report of the Commit-

phase nouvelle du différend roumano-hongrois," 34 (3e Sér.) *Revue générale du droit international public,* 1927, pp. 561-97; Le Fur, Louis, "La réforme agraire en Roumanie et le conflit avec la Hongrie, 56 *Bulletin mensuel de la Société de Législation Comparée,* 1927, pp. 437-65; Rolin, Albéric, "Les réformes agraires en Roumanie et la compétence des tribunaux mixtes," 8 (3e Sér.) *Revue de droit international et de législation comparée,* 1927, pp. 438-68; Duguit, Léon, "Le différend roumano-hongrois et le Conseil de la Société des Nations," *ibid.,* pp. 469-96. A large part of the July-October number of the *Journal du droit international* is devoted to discussions of different aspects of the Rumanian-Hungarian dispute: "Le rapport de Sir Austen Chamberlain"; André-Prudhomme, "Rôle et pouvoir du Conseil de la Société des Nations dans le différend," 54 *Journal du droit international,* 1927, pp. 843-74; Bartin, Etienne, "Les transformations de la propriété foncière roumaine et le régime des liquidations," *ibid.,* pp. 875-906; Picard, Maurice, "Les transformations de la propriété foncière roumaine et le droit international commun," *ibid.,* pp. 907-27. See also Wahl, Albert, "La question des optants hongrois et le Conseil de la Société des Nations," 34 *Revue politique et parlementaire,* 1927, pp. 205-16; Dupuis, Ch., "L'envers de Trianon—le conflit juridique roumano-hongrois," 99 *Le correspondant,* 1927, pp. 526-41; note of Professor Barthélémy in Dalloz, *Recueil périodique et critique,* 1927, 10e Cahier, Pt. 2, p. 137; Vallotton, Dr. James (former President of the American-Norwegian Arbitral Tribunal), "Die juristische Auffassung des Dreierkomitees des Völkerbundes unter dem Vorsitz Sir Austen Chamberlain's über den rumänisch-ungarischen Streit und seine Tragweite im Völkerrecht," 1 *Zeitschrift für Ostrecht,* 1927, Heft 9, pp. 1217-33; Politis, N., "Der Völkerbund und die gemischten Schiedsgerichte," *ibid.,* pp. 1234-43; Kaufmann, Dr. Erich, "Der ungarisch-rumänische Streit über die rumänische Agrarreform vor dem Völkerbundsrate," *ibid.,* pp. 1243-61; Scelle, George, "Le litige roumano-hongrois devant le Conseil de la Société des Nations," *Bibliothèque Universelle et Revue de Genève,* December, 1927, pp. 760-78; Deák, Francis, "The Rumanian-Hungarian dispute before the Council of the League of Nations," 16 *California Law Review,* 1928, pp. 120-33; Verdross, Dr. Alfred, "Die Verbindlichkeit der Entscheidungen internationaler Schiedsgerichte und Gerichte über ihre Zuständigkeit," 7 *Zeitschrift für öffentliches Recht,* 1928, pp. 439-52; Magyary, Dr. Géza, "Kompetenzstreit in der internationalen Schiedsgerichtbarkeit," 33 *Deutsche Juristen-Zeitung,* 1928, pp. 200-204; Fleischmann, Dr. Max, "Zum ungarisch-rumänischen Optantenstreite," 2 *Zeitschift für Ostrecht,* 1928, Heft 3, pp. 273-87; Schiffer, Eugen, "Gutachten zum ungarisch-rumänischen Streit," *ibid.,* pp. 288-98.

The legal opinions requested by the Hungarian claimants on the one hand, and by the Rumanian government on the other, are collected: *La réforme agraire roumaine en Transylvanie devant la justice internationale et le Conseil de la Société des Nations,* 2 vols. (Vol. 1, *"Quelques opinions";* Vol. 2, *"Autres opinions"*), Paris, 1928; *La réforme agraire en Roumanie et les optants hongrois de Transylvanie devant la Société des Nations,* 2 vols., Paris, 1927-28. See also: Borchard, Edwin M., *Opinion on the Rumanian-Hungarian Dispute,* New Haven, 1927; Wickersham, George W., *Opinion Regarding the Rights of Hungary and Certain Hungarian Nationals under the Treaty of Trianon,* New York, 1928.

tee of Three, and of the procedure proposed by it to the Council and to the parties. Our examination of these various points will be pursued in the following order:

1. The Committee deemed it necessary to inquire into the jurisdiction of the Mixed Arbitral Tribunal. *Has the Council of the League of Nations power to deal with the jurisdiction of international courts?*

2. The Committee concluded that "the claim of a Hungarian national for restitution of property in accordance with Article 250 might come within the jurisdiction of the Mixed Arbitral Tribunal even if the claim arises out of the application of the Rumanian agrarian law . . ." From this premise, the Committee laid down three principles, derived from its interpretation of the Treaty of Trianon. The appointment of deputy arbitrators is then conditioned upon the acceptance of these three principles. This condition carries with it the implication that the principles in question are intended for the guidance not only of the parties, but of the Mixed Arbitral Tribunal itself. *To what extent, if at all, is the Council empowered to interpret treaty provisions for the guidance of an Arbitral Tribunal?*

3. Assuming, for the sake of argument only, and without prejudice to the ultimate conclusion concerning the second point, that the Council acts within the scope of its authority in interpreting the Treaty, then *Do the three principles emanate from the provisions of the Treaty of Trianon and do they conform to the generally accepted principles of international law?*

4. Alternative sanctions are proposed at the end of the report in case the parties should refuse to accept it. *May the Council, within the terms of its reference* (Article 11, paragraph 2, of the Covenant, and Article 239 of the Treaty of Trianon), *compel the parties to accept the proposed settlement of their dispute?*

5. Deputy arbitrators were not appointed. *Is the ap-*

pointment of deputy arbitrators to the Mixed Arbitral Tribunals, in case a vacancy occurs, a duty or, under certain circumstances, may the Council at its discretion subject the appointment of substitute judges to any given conditions?

6. Let us assume, again for the sake of argument, that the foregoing questions have been answered in the affirmative, thus: that the Council has power to give judicial interpretation of the treaties; that the principles laid down in the report derive from the Treaty of Trianon and are generally accepted principles of international law; that the Council acted within its right in imposing sanctions on the reluctant party; and that the appointment of substitute arbitrators to a vacancy may rightly be made subject to conditions. *Finally,* then, *would the acceptance, by the parties, of the three principles solve the actual controversy?* This query resolves itself into two more specific questions: *What is the relation, if any, existing between the three principles and the jurisdiction of the Mixed Arbitral Tribunal over agrarian claims;* and *what effect, if any, might the acceptance of those principles have on that jurisdiction?*

We shall now proceed to a detailed consideration of the above enumerated problems in order that we may appreciate more exactly the intrinsic value of the report presented by the Committee of Three.

1. *Has the Council of the League of Nations power to deal with the jurisdiction of international courts?*

The question of the jurisdiction of international tribunals has been treated at length in the preceding chapter.[133] As was there discovered, it seems extraordinary that the Council of the League, an exclusively political body, should inquire into a strictly legal question such as the jurisdiction of an arbitral tribunal, established by a treaty, with reference to a case already decided. An analogous instance in the United States would be an inquiry by Congress into the jurisdiction of a Federal court. This, however, is unheard of. In every State

[133] Chapter III, p. 77: Jurisdiction of international tribunals.

it is the court itself which decides its competence; no other power, legislative or executive, can interfere with the judicial in this matter. It has been shown in Chapter III that this principle has been very generally adopted in the procedure of international tribunals.

There seems little doubt as to the legal character of the question of the jurisdiction of any tribunal, whether municipal, national, or international. As the dispute was brought before the Council under Article 11, paragraph 2, of the Covenant, we must ascertain whether Article 11 confers upon the League a power to exercise jurisdiction of an arbitral character in order to decide cases which are brought to it with reference to that article.

Article 11, pragraph 1, of the Covenant reads as follows:

> Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations . . .

Isolating this extract from the Covenant as a whole, it may be concluded that the Council, if called upon to act with reference to this article, not only *may* but *shall* take *any* action which it thinks fit to preserve peace. Such an interpretation of Article 11 would, of course, include the possibility of considering and deciding questions of a legal character, such as whether an international court had jurisdiction over a case brought before it. It may even be said that the decision of an international tribunal might be set aside or overruled, if the Council sees fit, in safeguarding the peace, or preserving goodwill among nations. In fact, considering Article 11 alone, the scope of the Council's activity is unlimited.

However, Article 11 does not stand alone. Furthermore, it would seem that the subsequent articles of the Covenant exclude judicial functions from the forms of action with which the Council is empowered.

In Article 12,

The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration, or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators, or the judicial decision, or the report by the Council . . .

Analysis of this article develops several facts.

First, there is a very clear distinction made concerning the two methods by which an international dispute might be adjusted. It is laid down concisely that such disputes should be submitted *either* to arbitration *or* to inquiry by the Council.

Further, there is a marked indication of the character to be attributed to each of these two distinct procedures: Article 12 speaks of the *awards* by the arbitrators *or* the *reports* of the Council. It seems reasonable to infer from this wording that the drafters of the Covenant were fully aware of the difference between the judicial character of arbitral procedure leading to an award, and the non-judicial, rather political, procedure of mediation leading to a report or a recommendation.

This differentiation is carried still further in Articles 13 and 15. Paragraph 2 of Article 13 enumerates in general terms the subject-matter, disputes over which are suitable for submission to arbitration. Article 15, on the other hand, describes the procedure to be followed in the case of disputes which were submitted not to arbitration but to mediation or conciliation by the Council.

There is little need to emphasize further the fact that the Covenant did not confer upon the Council judicial powers nor did it entrust it with juridical functions. But in case there remains any doubt as to the intentions of those persons who drew up the Covenant, it is enough to call attention to the fact that in the first draft of the Covenant of the League of Nations, prepared in Paris, provision was made for the setting aside of arbitral decisions by a three-fourths vote of the

Assembly.[134] The omission of this paragraph in the Covenant as ultimately adopted indicates conclusively that the contracting parties did not approve political review of judicial decisions.

It may be concluded therefore that there is not the slightest indication in the Covenant of the League to the effect that that instrument confers either judicial powers or juridical functions on the Council.

Having demonstrated that the jurisdiction of a tribunal is a question of juridical character, logic compels the conclusion that the Council of the League has no power, under the terms of the Covenant to inquire into the jurisdiction of a Mixed Arbitral Tribunal.

2. *To what extent, if at all, is the Council empowered to interpret treaty provisions for the guidance of an Arbitral Tribunal?*

Count Apponyi has asserted that the Council of the League, being an exclusively political body, could have no legal power to interpret treaty-provisions.[135] However, to restrict entirely the powers of the Council in this respect would be contrary to the spirit of the Covenant, as it would to a great extent paralyze the actions of the Council. The Council is called upon to adjust international disputes by conciliation and mediation. As such disputes frequently are the result of different conceptions by the parties of treaties or conventions, it would scarcely be possible for the Council to bring the litigants together without inquiring into the true import of the subject-matter of the litigation. Therefore, the right to study and interpret treaties cannot be absolutely denied to the Council. Neither can it be unlimited or unqualified. The extent of the right granted is defined by Sir Leslie Scott in his Opinion on the Rumanian-Hungarian dispute, in which he expresses the view that

[134] Senate Doc. No. 106, 66th Congress, 1st Session. Hearings before the Senate Committee on Foreign Relations, p. 1167 (Art. 5). This provision was still retained in a later draft (*ibid.*, p. 1216).

[135] League of Nations Official Journal, Vol. 8, No. 10, p. 1385.

The duty is not entrusted to the League of interpreting the Treaty for the purpose of guiding any legal tribunal, whether the Permanent Court of International Justice, a Mixed Arbitral Tribunal, or a national court. Whilst expressing this definite opinion, I must guard myself from being thought to mean that the League is not entitled, for the purpose of taking such action as falls within its powers and duties, to interpret the Treaty for its own guidance. It is obvious that it ought and must do so—for instance, for the purpose of conciliation under Article 11. Without forming a clear opinion as to the meaning of the Treaty, and it may be as to the meaning of some other document, whether treaty or rules of international law or national law, it could not in many cases take action effectively under Article 11 in order to bring disputing parties together unless it has a clear understanding of what it conceives to be the legal rights and obligations of those parties . . .[136]

Conceding the Council the power of interpretation of treaties in general terms and for the purpose well defined by Sir Leslie Scott, it is clear that this interpretation cannot be of a legal character; much less can it be a guide for a court or arbitral tribunal. The report of the Committee of Three purported to be that very thing—an interpretation of treaty-provisions as a guide for the Mixed Arbitral Tribunal. The Committee did not content itself with a simple interpretation of the treaty. Its purpose in fact was, intentionally or unintentionally, to impose upon the parties, and through them upon the Tribunal, principles resulting from this interpretation. Although the report does not explicitly state that these principles are to guide the Tribunal, yet this consequence results directly from the fact that the acceptance of these principles would restrict the liberty of pleading of the parties. If accepted, the parties could plead only within the limits set up by the three principles. Pleading being an essential part of any judicial procedure—hence of that of a Mixed Arbitral Tribunal—a restriction on it would necessarily constitute a restriction on the Tribunal itself.

[136] Sir Leslie Scott, *The Treaty of Trianon and the Claims of Hungarian Nationals with Regard to Their Lands in Transylvania*, London, 1927, pp. 3-4.

There is another, a more direct method, employed to impose these principles on the Tribunal. The appointment of deputy arbitrators (which is absolutely necessary to insure the normal functioning of the Tribunal) was made conditional upon the acceptance of the parties of the three principles. Regardless of the right of the Council to make conditional the appointment of deputy arbitrators in case of a vacancy on the Tribunal—a question to be considered later—it may be said with certainty that there is nothing in the Covenant which would authorize the Council to take such action and impose upon an international tribunal a doctrine in conformity with which the judicial process should be conducted. This would clearly be a political interference with judicial functions.

This point was advanced with particular emphasis by the Hungarian representative during the debates in the Council. He said:

all through the evolution of the institutions of the League, the distinction to be established between the judicial power and the political power has never been forgotten. Care has always been taken not to confuse these two kinds of authority, which are entirely distinct, or to permit them to overlap. Above all, care has always been taken to ensure the independence and inviolability of the magistrature which is, in the domestic life of the nations as in international life, one of the pillars of security, dignity and liberty.

This is what is particularly troubling me. I see here a tendency to ask the Council to assume the rôle of an arbitral tribunal, setting itself up above the Court constituted by the Treaty itself . . . It is desired to impose on the two parties the acceptance of the three principles which I have just described . . . It would clearly be necessary that there should be a special agreement between them, in which they would undertake not to plead beyond the very narrow limits traced by these proposals. In a word, a limit would be fixed to the liberty of the parties in the case to plead.

To tell a party who comes before a judge that he should only plead this or that, and confine his pleadings within those limits, is to restrict his liberty of pleading.

Every one knows and all jurists recognize that the liberty of pleading is one of the essential parts of the liberty of the magistrature. It is only when the parties in the case have full liberty to bring to the knowledge of the judge all that they believe might serve their cause that the judge can be in possession of all the material which he requires in order to give his judgment. It is understood that if, in their conclusions, the parties abuse their liberty of pleading, it is for the judge in his discretion to appreciate the position, to direct their attention to the fact, and to call them to order. Further, limits imposed on the liberty of pleading are, also, indirectly, limits imposed on the jurisdiction itself.[137]

There is a very clear provision in the Covenant itself indicating that interpretation of treaties is a function rather beyond the political activities of the League. In studying our first question, it has been pointed out that Article 12 names "either arbitration or inquiry by the Council" as two distinct methods for the settlement of international disputes. Article 13, paragraph 2, then enumerates a number of issues, disputes over which "are declared to be among those which are generally suitable for submission to arbitration." The first issue mentioned is: "disputes as to the interpretation of treaties."

It may be concluded, therefore, that whereas the Council of the League has the right and power to interpret treaties, this interpretation has not and cannot have a legal character in international law; and that, whereas the Council may in its capacity of mediator or conciliator ask the parties to adhere and accept this interpretation, in the interest of preserving peace, yet it has no power under any article of the Covenant to impose its interpretation of a treaty-provision as a guiding principle upon any international tribunal.

3. *Do the three principles emanate from the provisions of the Treaty of Trianon and do they conform to the generally accepted principles of international law?*

a. The first thesis formulated in the report reads:

[137] League of Nations Official Journal, Vol. 8, No. 10, p. 1387.

The provisions of the peace settlement effected after the war of 1914-18 do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.

This proclamation, as it stands, corresponds with the facts. The argument has been advanced that the Treaty of Trianon places under especial protection the property of Hungarian optants, and it was intimated that this protection extends even so far as to exempt such property from the operation of an agrarian reform. This theory, however, was not the assertion of the counsel of Hungarian claimants. On the contrary, it was baldly declared both before the Arbitral Tribunal and before the League that an agrarian reform as such is not incompatible with the provisions of the Treaty of Trianon respecting the property of optants. Thus far, then, the thesis of the Committee of Three appears correct.

In the explanatory remark following the first thesis, the report says:

Article 250 forbids the application of Article 232 to the property of Hungarian nationals in the transferred territory. Under the terms of Article 250, the prohibition to retain and liquidate cannot restrict Rumania's freedom of action beyond what it would have been if Articles 232 and 250 had not existed. Even if none of these provisions appeared in the Treaty, Rumania would none the less be entitled to enact any agrarian law she might consider suitable for the requirements of her people, subject to the obligations resulting from the rules of international law. There is, however, no rule of international law exempting Hungarian nationals from a general scheme of agrarian reform.

The question of compensation, whatever its importance from other points of view, does not here come under consideration.

This language seems both confused and contradictory. First it is said that Rumania is free to enact any agrarian reform whatever, regardless of Articles 232 and 250, and subject only to restrictions imposed by international law. Next, the problem of compensation is discarded as irrelevant.

What, then, is that international law which would be the only limit of the Rumanian legislature, were Articles 232 and 250 of the Treaty of Trianon nonexistent?

International law imposes on civilized states the obligation to protect the life, liberty and property of aliens who come to and reside lawfully in such states. On the other hand, aliens residing in a foreign country are obligated to live in accordance with its laws and are subject to the jurisdiction of its courts. Their property is also subject to the laws of the nation wherein they reside, or else of the nation wherein the property is situated. Consequently, if Hungarian optants have real property in Transylvania, which Rumania chooses to expropriate for the purpose of an agrarian reform, she has a perfect right to do so. That Hungarian nationals are not exempt from the operation of such an agrarian law may be accepted, even though it is arguable in view of certain provisions of the Treaty of Trianon. Thus far the explanation of the first thesis seems in accordance with international law.

But the statement that compensation comes not into consideration destroys all the previous reasoning. Whereas both national and international law admit that private property may be expropriated in public interest, this rule is subject to the condition that just compensation be given.[138] Thus, Sir Austen Chamberlain's report eliminates a most essential element in the issue of expropriation—that of compensation. If accepted, the first thesis of the Committee of Three amounts to this:

Being a sovereign state, Rumania may enact any laws for an agrarian reform, the only limitation on her action being such as may be found in international law. Such an agrarian reform is applicable to Hungarian nationals and optants, for there is no rule in international law exempting the property of Hungarian nationals situated in Rumania, nor do Articles

[138] This principle is so universally accepted that it seems unnecessary to refer to authoritative textbooks, diplomatic correspondence or decisions of arbitral tribunals as sources from which this principle has been derived.

232 and 250 of the Treaty of Trianon limit in any way her liberty of action in this respect. Therefore Rumania, sanctioned by the Treaty and by international law, may expropriate Hungarian nationals and it is immaterial whether those expropriated landowners receive a full and just compensation. Furthermore, it makes no difference whether the payment of compensation is fixed at the time of the expropriation or at a date fifty years in the future. This is the inevitable conclusion resulting from the acceptance of the theory that indemnity has no bearing on the question of expropriation.

Quite obviously the view taken by the Committee of Three with respect to the bearing of the question of indemnity on the issue in dispute is erroneous. It is not in conformity with existing international law, for the conception of expropriation necessarily embraces as one of its constituents the payment of an adequate indemnity. Lacking such compensation, we have not expropriation, but confiscation—a conception diametrically opposed both to the Treaty of Trianon and to international law.

Then, too, the drafters of the Treaty of Trianon seem to have entertained a different opinion as to the vitality of the question of compensation. By Article 233 Hungary undertakes

> Not to subject the property, rights and interests of the nationals of the Allied and Associated Powers to any measures in derogation of property rights which are not applied equally to the property, rights and interests of Hungarian nationals, and *to pay adequate compensation in the event of the application of these measures.*[139]

Thus an infringement of property rights is sanctioned in the Treaty, but only under the condition that adequate compensation is paid.

b. The ambiguity and error of the first thesis in eliminating the question of compensation becomes increasingly ap-

[139] Italics the author's.

parent when considered together with and in the light of the second thesis of the report.

According to the second principle, "There must be no inequality between Rumanians and Hungarians, either in the terms of the agrarian law or in the way in which it is enforced."

The Committee reasons along the following lines:

Neither the Treaty of Trianon nor international law excludes the application of an agrarian law to Hungarian nationals; they may be expropriated, and we need not consider whether they have been paid a full and just compensation. The only condition upon which the compatibility of the agrarian law with the Treaties depends is that there should be no discrimination in law or in fact between Rumanians and Hungarians.

It would be gross misconception to consider the second thesis of the report as an inevitable conclusion resulting from the interpretation of the Treaty of Trianon, or as an axiomatic statement of international law. The application of a law to nationals and to aliens alike does not *ipso facto* make the law conform to international law, nor does such conformity obtain by implication from the Treaty. There seems to exist a generally accepted standard for the treatment of the person and the property of aliens in foreign countries. The inviolability of the ownership of private property and the principle of respect for vested rights have been universally accepted in international law. It has seldom even been questioned, until the recent world war, when the introduction of the Soviet régime in Russia and the confiscation and liquidation of alien enemy property seem to have given a severe blow to this well-established principle.[140] It should not be forgotten, however, that the principle of inviolability of private property was reaffirmed by the Peace Treaties of 1919-20—thus, also, by the Treaty of Trianon.

[140] Borchard, Edwin M., *Les principes de la protection diplomatique des nationaux à l'étranger,* Bibliotheca Visseriana, Vol. 3, p. 18.

It was this principle which afforded a state the right to intervene on behalf of its nationals whenever another state disrespected in any degree this internationally recognized right of property. While it is unquestionably true that as to the person, liberty or property of its own nationals every state has absolute freedom of legislation, unhampered by any other state, yet it is equally true that the legislating state may be held responsible for such acts in so far as they affect nationals of other states in a manner contrary to international law.

"There is no principle of the law of nations more firmly established," once wrote a Secretary of State of the United States, "than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to protection of its soveriegn by all the efforts in his power." [141]

The same opinion seems to prevail in Continental Europe. Fauchille, speaking of the right and duties of states towards aliens, concludes that, as a general rule, foreigners should receive no better treatment and should have no more privileges than nationals. However, he declares, this principle is subject to one derogation, namely, that a state cannot, without provoking the legitimate intervention of other states, deprive aliens of the basic rights of modern civilization, *such as the right of property,* even though it chooses to so deprive its own nationals.[142]

[141] Mr. Adams, Secretary of State, to Mr. de Onis, Spanish Minister, March 12, 1818, Am. St. Pap., For. Rel., 4, pp. 468, 476; quoted in Moore, J. B., *A Digest of International Law,* Vol. 4, p. 5.

[142] Fauchille, Paul, *Traité de droit international public,* Vol. 1, Pt. I, Paris, 1922, p. 934: ". . . un État ne saurait faire aux étrangers une situation meilleure qu'à ses propres nationaux . . . Ce dernier principe souffre cependant sui-même une double dérogation: . . . 2e Si beaucoup pensent qu'un État, en organisant son gouvernement intérieur, peut, sans provoquer une intervention de la part des autres États, enlever à ses nationaux des droits qui sont la base de la civilisation moderne, par example le droit de propriété, la plupart, au demeurant, estiment qu'il ne saurait agir de la sort vis-à-vis des étrangers sur son territoire sans saulever les réclamations légitimes de l'État auquel ils appartiennent."

But the Committee of Three states the contrary—that the agrarian law cannot be invalid if Rumanians and Hungarians are affected equally. On this point, the Committee of Three also seems to be in opposition to the decision of the Permanent Court of International Justice recently rendered and relating to an expropriation under a law which was alleged to apply to every one without discrimination. The Court was of the opinion that the application of a law to nationals and aliens alike will not make expropriation without adequate compensation conform to international law.[143] Nor does the Court differentiate between the issue of compensation and that of expropriation. From the juristic point of view, the pronouncement of the Permanent Court of International Justice seems more meritorious than that of the Council of the League.

In another recent decision, this time by the United States-Mexican Claims Commission, the following passage is found:

> Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. . . . .[144]

The acceptance of this second thesis of the report would justify the confiscation of alien private property by Soviet Russia; but Great Britain would scarcely acquiesce in this measure, although the principle suggested by Sir Austen Chamberlain's committee would carry this implication. Nor does the history of the last ten years disclose any decisive tendency on the part of the leading nations of the civilized world as, for example, France or the United States, to as-

[143] *Supra*, note 92.

[144] The United States of America, on behalf of Harry Roberts, *v.* Mexico (1926). See Opinions of Commissioners under the Convention Concluded September 8, 1923, between the United States and Mexico (February 4, 1926, to July 23, 1927). Washington, 1927, p. 100, at p. 105.

sume it in perfect harmony with international law for the Soviet government to confiscate the property of their nationals upon the consideration that Russian nationals were subject to the same confiscation.

Neither did the French and British governments consider that the equal application of the law to Rumanians and aliens would exempt Rumania from further obligation, when their nationals suffered from expropriations under the agrarian law in Bessarabia. On the contrary, the facts on record show that they exacted full and just compensation from the Rumanian state.

In June, 1923, the Rumanian Minister of Finances presented a memorandum on behalf of his government stating Rumania's position with regard to the general question of reparation. In this memorandum, presented to the Allied and Associated Governments, the following statement is to be found under item *g:*

> Expropriation of the lands of British and French subjects in Bessarabia.—The obligation to pay compensation—resulting from the recognition by the Allied Powers of the restoration of Bessarabia to Rumania—involves a sum exceeding one million pounds sterling, including interest as from January 1, 1919. If the regulations in force with regard to Rumanian subjects were applied, the amount would not exceed twenty-two million lei.[145]

Taking into account the value of the currency at the time the memorandum was delivered, it seems that British and French subjects received compensation forty times greater than that accorded to Rumanian nationals. One may ask whether this compensation has been demanded and paid on the principle of equality laid down in the report of the Committee of Three. Apparently not; instead, it was requested on the principle that there is a certain standard in the treatment of the person or property of aliens; that this standard is

[145] Annex No. 2 to the Hungarian application of May 21, 1927, to the Council of the League for the appointment of deputy arbitrators for the Mixed Arbitral Tribunal. Author's translation from French MS.

not dependent on the treatment which a state accords its own nationals; that if the acts of a state with respect to aliens fall below that international standard commonly agreed upon and adhered to by civilized nations, that state is responsible for such acts even to the extent of paying indemnity or compensation.[146]

As Professor Borchard stated:

the question how far a nation may go in depriving a foreigner of his vested rights without violating international law, when it also deprives nationals of those rights, is far from settled and can only be settled by an authoritative determination of an impartial tribunal whose decision must be accepted by an international community which boasts of its civilization. . . . The Committee of Three seems to have reached a definite conclusion on this issue, and thus to foreclose a very doubtful and difficult question of international law. In my judgment, such a question can only be determined by an authorized judicial body, unless the world is already prepared to admit that the confiscation of all private property in a country, when applied to natives and aliens, is not a violation of international law. . . .[147]

[146] Dupuis, Ch., "Le différend roumano-hongrois au conseil de la Société des Nations en septembre, 1927," 1 *Revue de droit international,* 1927, p. 893, at p. 927: "Le second principe énoncé dans le rapport ne peut s'expliquer que par l'idée que le traitement national est le maximum de ce à quoi peuvent prétendre les étrangers. Or, cette idée est tout à fait contraire aux principes du droit international commun reconnus, non seulement par la très grand majorité de la doctrine, mais encore par la pratique. La condition des étrangers ne se règle pas, en droit international, sur celle des nationaux. Elle leur est inférieure à beaucoup d'égards; elle leur est supérieure à quelques égards. Les étrangeres n'ont aucun titre à réclamer les droits politiques ou civiques dont jouissent les nationaux. Souvent, ils ne sont pas admis à jouir de tous les droits civils dont bénéficient les nationaux. Parfois, à raison de différences de civilisation, de mœurs, de coutumes ou de législation, il à été jugé, à juste titre, nécessaire de leur assurer, par traités, des droits spéciaux, des exemptions ou des privilèges . . . Les étrangers ont toujours titre à réclamer le respect des droits acquis, même au cas où l'État sur le territoire duquel ils se trouvent ou se trouvent leurs biens, ne respecte pas les droits acquis de ses nationaux . . . Les États dont ils sont ressortissants sont fondés à réclamer, au nom de l'égalité des souverainetés, la restauration des droits méconnus de leurs ressortissants, la réparation des torts et dommages indûment infligés à ceux-ci . . ."

[147] Borchard, Edwin M., *Opinion on the Rumanian-Hungarian Dispute,* New Haven, 1927, p. 27.

This second thesis is, however, subject to criticism from another angle—that of the Treaty of Trianon from which the principle supposedly emanates. Contrary to the assertion of the report, the text of the articles referred to, as well as the circumstances and the considerations which ultimately led to the drafting of the provisions contained therein, indicate beyond a reasonable doubt that the purpose of those provisions was to place under especial protection the property of Hungarian nationals and optants situated in the transferred territory, not as a privilege but as a prevention against possible spoliation. In fact, the plausible fear expressed by the Austrian and Hungarian delegates respectively directed the attention of the Peace Conference to the possibility of such a danger.[148] It was the recognition of this possibility which prompted the drafters of the Treaty to insert in Article 63 an unmistakable stipulation that optants "will be entitled to retain their immovable property." [149]

Furthermore, it may be argued that the intention of the Principal Allied Powers truly was to protect Hungarian nationals from possible spoliation even under the provisions of a general scheme of agrarian reform. This protective provision is repeated verbatim in Article 3, paragraph 3, of the Treaty concluded between the Principal Allied and Associated Powers and Rumania at Paris on December 9, 1919.[150] It seems clear that it was the purpose of the Powers to prevent spoliation in any and every form; the Powers foresaw the possibility of such spoliation in a disguised form and therefore provided in Article 1 that

> Rumania undertakes that the stipulations contained in Articles 2 to 8 [consequently Article 3, paragraph 3] of this Chapter shall be recognized as fundamental laws, and that no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them.

[148] *Supra,* Chap. I.

[149] The French text reads: "Elles seront libre de conserver les biens immobiliers qu'elles possèdent sur le territoire de l'autre État."

[150] *Supra,* note 12.

With reference to Article 3, paragraph 3, the provision of Article 1 means this much:

Rumania recognizes as a fundamental law that optants are *entitled* to *retain* their immovable property; she may legislate with respect to the immovable property of her nationals in whatever way she pleases; but none of her laws, regulations or official actions—in other words, none of her legislative, administrative or executive acts—shall conflict with this obligation; and if any such act might conflict with it and should infringe upon the *rights* of Hungarian optants who are *entitled* to *retain* their immovable property, then the rights of those Hungarian optants hold good, for their rights are recognized as emanating from a fundamental law over which no other law can prevail.

Giving the word "retain" (in French, *conserver*) a narrow interpretation, it may be argued that it means a retention of immovable property *in natura;* in other words, it may mean that Hungarian optants should not be subjected to any form of law depriving them of their property or any part thereof.

A liberal interpretation, and that adopted by the Hungarian government and counsel of Hungarian optants, will not exempt this property from an expropriation under the general scheme of an agrarian reform provided that full and just compensation is paid. The right to *retain* will be unimpaired only if the substantial value of his property is at the free disposal of the owner. This is an additional proof of the error in the reasoning of the Committee of Three in eliminating from consideration the question of compensation.

Finally one may ask whether Article 250 of the Treaty of Trianon supports the proposal of the second thesis. The answer here, also, seems to be negative. Article 250 not only says that Hungarian nationals or corporations controlled by them shall not be subject to retention or liquidation; Article 250 goes further, stipulating that if such property, rights and interests have been subjected to retention or liquidation, to "any measure of this kind," or to "any other meas-

ure of transfer, compulsory administration, or sequestration," restoration shall be made to the owners. Moreover, such property, rights and interests shall be restored "in the condition in which they were before the application of the measures in question."

The general tendency of international law, proceeding on sound principles, is unquestionably opposed to granting the person or property of aliens a status more favorable than that granted to nationals. Yet this principle is far from being one which holds good everywhere or under all circumstances. The second thesis of the report, therefore, cannot be declared an axiom of international law. Much less can it be deduced from the Treaty, the interpretation of which supposedly led the Committee of Three to its conclusion. It is impossible to detect in the texts referred to, or in any other part of the Treaty, any words which would warrant the view that the sole condition necessary to qualify the Rumanian agrarian law as meeting that country's conventional obligations is that their should be no inequality between Hungarians and Rumanians. There is nothing in the Treaty of Trianon or in the Minority Treaty (which is corollary to the former) which would say:

The property, rights and interests of Hungarian nationals or optants situated in the transferred territories shall be not subject to retention or liquidation, and these should be restored to their owners, freed from any such measure and in the condition in which they were before these measures were taken. These Hungarians are entitled to retain their property in Transylvania, and no law, regulation or official action on the part of the new sovereign shall impair their right. But if Rumania enacts a land reform law, she can take away the property of these Hungarians under the one condition that that law be applied equally to Rumanians and Hungarians. Whether the Hungarians receive a just compensation or whether they receive any compensation at all does not matter; nor is it material whether they have *re-*

tained their immovable property. The only thing which matters is that there should be no inequality in treatment.

However incredible it may seem, the first two proposed principles of the report carried to their logical conclusion would inevitably result in the thesis outlined immediately above. Such a thesis can hardly be said to be in harmony with international law; further than that, it is positively contrary to the spirit and letter of the Treaty of Trianon.

c. The third thesis suggests that

> The words "retention and liquidation" mentioned in Article 250, which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.

The reasoning on which this thesis proceeds is the following:

> The right which the Allied Powers reserved to themselves under Article 232 to retain and liquidate Hungarian property within their territory at the time of the entry into force of the Treaty applies to the property of a Hungarian inasmuch as he is a national of an ex-enemy country. It is not sufficient that these measures entail the retention of Hungarian property by the Government and that the owner of this property is a Hungarian. The measure must be one which would not have been enacted or which would not have been applied as it was if the owner of the property were not a Hungarian.

The system of retention and liquidation being introduced by the Peace Treaties of 1919-20, the sole reference for interpretation is the text of those treaties; general principles of international law cannot be taken into consideration. The question is, therefore, whether the interpretation given to these terms by the Committee of Three corresponds to the Treaty.

Article 250 refers in its entirety to Article 232 and to the Annex to Section IV; the meaning of the words "retention and liquidation" should be considered in view of the use of these

words in those Articles. According to Article 232, paragraph 1, *b:*

> Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Kingdom of Hungary, or companies controlled by them . . .

The contrary stipulations to which this disposition is subject are found in Article 63 with respect to Hungarian optants, and in Article 250 with respect to Hungarian nationals. The former are entitled to retain their immovable property. The property of the latter is not to be retained or liquidated by the Allied Powers; if any such measure has already been directed against such property, it should be restored to its owner in the condition in which it was when the measure was taken.

Paragraph 1, *d,* indicates that the expressions "exceptional war measures," "measures of transfer," or "acts done or to be done in execution of such measures," are defined in paragraphs 1 and 3 of the Annex to Article 232. Paragraph 3 of the Annex reads as follows:

> In Article 232 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect to remove from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for *whatsoever motive, under whatsoever form or in whatsoever place.* Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts,

the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation or devolution of ownership in enemy property, or the cancelling of titles or securities.[151]

In view of the interrelationship between Articles 232 and 250, it seems unquestionable that "retention and liquidation" in Article 250 was used in the same sense as "retain and liquidate" in Article 232; it is equally evident that "retain and liquidate" is included in the terminology of "exceptional war measures" and "measures of transfer" throughout Article 232 and its Annex.[152] Thus, it seems reasonable to suppose that "retention and liquidation" in Article 250 purports to include by reference all acts enumerated in paragraph 3 of the Annex, and that compulsory expropriation might be included in that list. This is even more evident as paragraph 3 of the Annex does not attempt to give an exhaustive list of definitions; it only enumerates a number of them and says that any and all other measures, "for whatsoever motive, under whatsoever form or in whatsoever place," which *had* or *will have* the *effects* and *objects* described are included in the definition. It is important to observe that measures previously taken are included, as well as measures which will be taken in the future. It is still more important to remark that the definition depends on the *effect* and on the *object* of the particular act. The qualification of the act, therefore, is not primarily dependent on the fact that the measure affects the property of an ex-enemy—in this case that of Hungarians; the qualification depends first of all on the effect and object of the measure.

The Committee of Three, however, takes a different stand. The Hungarian claimants must prove that their property

[151] Italics the author's.

[152] Opinion of Sir Leslie Scott, *supra*, note 136, p. 8.

was taken; whether it was taken without the payment of an adequate compensation is immaterial; but it must be proved that there was an inequality in the treatment accorded to Hungarians and Rumanians. After this proof has been made, there still remains to be proved a real intent on the part of Rumania to remove the property on the ground that such property belonged to a Hungarian; it should be proved that the measure under complaint is not intended to be applied to the property of anyone but Hungarian nationals.

In the administration of the various branches of justice, criminal law alone searches for the intention prompting a committed act. It would be extremely difficult to discover and to prove the intention with which a measure under complaint was enacted by a Parliament. No method has yet been devised to ascertain the intention of a legislative body of a state. If a claim is brought to the Mixed Arbitral Tribunal under Article 250, for an alleged "retention" or "liquidation" of property, and if, before the Tribunal can declare its jurisdiction, the claimant has to prove that the complained measure "would not have been enacted" or "would not have been applied as it was, if the owner of the property were not a Hungarian," then any such complaint would be frustrated at the entry of the claim. Were this true, the protective provision of Article 250 giving an impartial judicial forum the right to decide claims arising out of alleged retentions or liquidations would be idle and useless. The purpose of Article 250 was to protect Hungarian property from possible spoliation, and any construction which would vitiate this protective provision cannot be a principle rightly deduced from the Treaty.

It may be concluded, then, that none of the three principles laid down by the Committee of Three is consistent with and deduced either from international law or from the text of the Treaties. Studied separately, the three principles bear out this fact; studied collectively, they bear even greater witness to this conclusion.

4. Alternative sanctions are proposed at the end of the report in case the parties should refuse to accept it. *May the Council within the terms of its reference compel the parties to accept the proposed settlement of their dispute?*

The basis of the Council's action in this particular was Article 11, paragraph 2, of the Covenant, upon which Rumania requested the intervention of the League, and Article 239 of the Treaty of Trianon, upon which the Hungarian request was based. The question whether the request for the appointment of deputy arbitrators to fill the place of the recalled Rumanian judge can be made conditional will be considered later. At present our inquiry is limited to the powers of the Council under Article 11 of the Covenant.

According to Article 11, any war or threat of war concerns the League, and the League "shall take any action that may be deemed wise and effectual to safeguard the peace of nations." It was under paragraph 2 of this article that Rumania exercised her "friendly right" in bringing before the Council a matter threatening "to disturb international peace or the good understanding between nations."

The Covenant does not stop with saying that the League may take any action deemed wise and effectual for safeguarding peace. It provides, in Article 12, that disputes which may endanger peace shall be submitted to amicable settlement: either to judicial settlement through arbitration, or to a non-judicial settlement, viz., inquiry or conciliation or mediation by the Council. Mediation or conciliation by the Council is thus sharply differentiated from judicial settlement by arbitrators.

Article 13 then lays down general principles as to the mode and methods of arbitration. The mode and methods of conducting the Council's action is treated at length in Article 15. The opening sentence of Article 15 seems to imply that only disputes which are not submitted to arbitration should be referred to the Council; the Covenant seems to give preference to arbitration over inqiury by the Council.

If action by the Council is chosen, the procedure to be followed consists of an endeavor by the Council "to effect a settlement of the dispute," and publication of the terms of the settlement if any is brought about. Article 15 continues:

> If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

There is not a word, not even an implication, in Articles 11, 12, and 15 which could be construed to give the Council (or the Assembly) of the League power to impose sanctions on the parties before it. On the contrary, it is made clear that the Council, when called upon to settle international disputes, acts in an advisory capacity as mediator or conciliator. It has no power, no right, to force upon the parties the acceptance of its advice or recommendations. Once admitted—and it would be difficult, indeed, to prove the contrary—that the Council's sphere of action is that of good offices, mediation, conciliation and inquiry, all the inherent characteristics of these modes of pacific settlement of international disputes attach to such actions of the Council. One of the most essential qualities of mediation and conciliation is that the parties are under no obligation to accept the proposals or suggestions of the mediator. Another important characteristic is that the mediator cannot and should not force the parties to accept his conclusions. The essential difference between arbitration and mediation is that the arbitral award binds the parties, while the mediator's opinion is merely advisory.

The powers of the Council are very broad and should not be limited in a manner which would paralyze its activity as the guardian of peace. The Council should be allowed every permissible means to bring about the settlement of a dispute likely to lead to war. But its efforts cannot go beyond the limits which the Covenant itself imposes. To press sanctions

on the reluctant party is obviously an usurpation of powers which Article 11 and the correlative Articles 12 and 15 do not confer upon the Council.

Credit should be given to the members of the Committee of Three that they have forgotten their limitations only in the zeal of their endeavor to settle in some manner a type of dispute which is becoming chronic in Southeastern Europe. Still more credit is due, however, to the statesmanship of those members of the Council whose opposition saved the League of Nations from embarking on a perilous course of action.

5. *Is the appointment of deputy arbitrators to the Mixed Arbitral Tribunals, in case a vacancy occurs, a duty laid upon the Council by the Treaty, or, under certain circumstances, may the Council at its discretion subject the appointment of substitute judges to any given conditions?*

Article 239 of the Treaty of Trianon provides that Mixed Arbitral Tribunals shall be established between each of the Allied Powers and Hungary, each Tribunal having three members. Each of the governments concerned shall appoint one member, the President of the Tribunal being chosen by agreement between those governments.

In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations, or, until this is set up, by M. Gustave Ador if he is willing. These persons shall be nationals of Powers that have remained neutral during the war.

If in case there is a vacancy a Government does not proceed within a period of one month to appoint as provided above a member of the Tribunal, such member shall be chosen by the other Government from the two persons mentioned above other than the President.

Paragraph 1 of the Annex to Article 239 further provides:

Should one of the members of the Tribunal either die, retire or be unable for any reason whatever to discharge his functions, the same pro-

cedure will be followed for filling the vacancy as was followed for appointing him.

In no part of Article 239, nor in the Annex thereto, can there be found any indication that the Council may or may not, at its discretion, appoint two deputy arbitrators, from whom, in case a vacancy occurs, either government concerned may choose an arbitrator. On the contrary, Article 239 shows that its purpose was to establish and insure the normal, unobstructed functioning of the arbitral tribunals under all conceivable circumstances and in spite of any possible ill-disposition on the part of either party. Article 239—which is the only article of the Treaty which is pertinent to our inquiry —in no way warrants an assumption that the performance of appointing deputy arbitrators may be made conditional under any particular situation. This task imposed upon the Council seems to be ministerial and mandatory. The Committee of Three seems to have reached the conclusion that there was a conflict between the duty of the Council acting in a controversy under Article 11 of the Covenant and its duty under Article 239 of the Treaty of Trianon. The Committee was of the opinion that "it could not evade the duty imposed on it by the Covenant and confine itself simply to the election of the two deputy members for the Mixed Arbitral Tribunal, which the Hungarian representative had as a result of the proceedings demanded."

The point of view taken by the Committee is perfectly justifiable thus far. The Council has the duty in the terms of Article 11 of the Covenant to preserve peace. In performing this task, the Council might conceive that the fulfillment of the Hungarian request would make even more difficult the settlement of the controversy. Considering this, it seems right that the Council should have the power, at its discretion, to defer the performance of this second duty, the performance of which could be an obstacle to the performance of the first

one. As long as there was or is any slight hope that the conciliatory action of the Council may succeed, the Council is justified in postponing decision on this matter. If the prospect of conciliation has failed, the Council should immediately proceed to the appointment of deputy arbitrators. The power of the Council under the Covenant cannot extend so far as to destroy a duty imposed on it by the Treaty to which the Covenant is the preamble .

On several occasions the Council has acted in conformity with provisions of the Treaties of Versailles and Saint-Germain respectively, which provisions are identical with those contained in Article 239 of the Treaty of Trianon. M. Poincaré, then Prime Minister of France, in a letter addressed to the President of the Council, called attention to the fact that "it is for the Council of the League of Nations to choose, for each Mixed Arbitral Tribunal, or for each independent Division, two persons, who may, in case of need, take the place of the President or of a national arbitrator." [153] Upon the request of M. Poincaré and a report presented to the Council by M. Blanco (Uruguay), the Council, in its meeting of February 3, 1923, appointed substitute members for the four independent sections of the Franco-German Mixed Arbitral Tribunal as well as for the Franco-Austrian, Franco-Hungarian and Franco-Bulgarian Mixed Arbitral Tribunals.[154] These appointments were made in conformity with Article 304 of the Treaty of Versailles, which is identical, *mutatis mutandis,* with Article 239 of the Treaty of Trianon.

A similar request was addressed to the League by the Belgian Minister of Foreign Affairs on February 28, 1923,[155] and upon the report of M. Guani (Uruguay) the Council proceeded without hesitation at its meeting of April 17, 1923, to the appointment of substitute members for the Belgo-Ger-

[153] Letter dated January 28, 1923. League of Nations Document C. 101. 1923.
[154] League of Nations Official Journal, Vol. 4, No. 3, p. 242; for M. Blanco's report, see *ibid.,* p. 399.
[155] League of Nations Document C. 197. 1923. V.

man, Belgo-Austrian, Belgo-Hungarian and Belgo-Bulgarian Mixed Arbitral Tribunals.[156]

After the occupation of Ruhr, Germany recalled her national judges from the Mixed Arbitral Tribunals. The procedure in Article 304 of the Treaty of Versailles (identical with Article 239 of the Treaty of Trianon) was followed in completing the Tribunal. One month after the fact was established that the Tribunal could not function, due to the absence of the German arbitrator, the French government chose, from those persons appointed by the Council of the League at its meetings of February 3, 1923, a substitute to replace the German arbitrator.[157]

[156] League of Nations Official Journal, Vol. 4, No. 6, pp. 555, 599; for M. Guani's report, see: *ibid.*, p. 629.

[157] *Recueil des décisions des Tribunaux Arbitraux Mixtes institués par les Traités de Paix*, 1923, Vol. 2, pp. 870 ff.

It is not without interest to see the attitude which the different parties took on this occasion.

At the session of the Franco-German Mixed Arbitral Tribunal held January 22, 1923, the following letter, dated January 19, and addressed to the President of the Tribunal by the agent of the German government, was read:

"Messieurs les Présidents,

"J'ai l'honneur de vous faire la communication suivante, au nom du gouvernement et des arbitres allemands:

"La situation politique actuelle ne paraissant pas permettre une coopération utile des organes allemands et français, les arbitres et l'agence allemands se croient obligés de s'abstenir jusqu'à nouvel ordre de participer aux audiences du Tribunal.

"Veuiller agréer . . . ," etc. [signed] Johannès

In his answer, dated January 21, the President of the Tribunal informed the agent of the German government that the session of the Tribunal fixed for the 22d would be held. He also expressed the opinion that the political situation had no bearing on the high mission of the administration of justice and that the Tribunal, in the performance of its tasks, is entirely outside the sphere of politics.

The President after establishing the fact that the absence of the German arbitrator made the functioning of the Tribunal impossible, adjourned the session with the following words:

"Je regrette vivement la constatation que nous venons de faire. Instrument de paix, la Haute Juridiction du Tribunal a été établie en dehors de toute politique et j'estime qu'elle représente un grand progrès dans la vie du droit international . . . J'espère et je souhaite que le gouvernement allemand reviendra rapidement sur sa décision. Mais, en tout cas, j'ai la certitude que *la stricte application des principes établis dans le Traité de Versailles permettra sans délai le fonctionnement intégral du Tribunal arbitral mixte franco-allemand.*"

In view of the above considerations, one logically arrives at the following conclusion:

The Council, acting under Article 11 of the Covenant, might be justified in turning from a strict and literal application of Article 239 of the Treaty of Trianon and deferring the appointment of deputy-arbitrators. On the other hand, neither the Covenant nor the Treaty gives the Council the power to make such appointments dependent upon the fulfillment of any condition by either of the parties to the dispute. It further seems that to defer this appointment beyond a reasonable period and thus to impede the administration of justice is contrary to the Treaty, which charges to the Council the mandatory task of completing, in cases of necessity, the Mixed Arbitral Tribunals; it is also contrary to the Covenant,

On March 3, 1923—scarcely six weeks after the functioning of the Tribunal was suspended, the deputy-arbitrators chosen by the French government to replace the recalled German arbitrators were installed and the Tribunal proceeded with its hearings. The French Minister of Justice, who represented his government at the solemn act of installation of the deputy arbitrators, addressed the Tribunal:

"Le Tribunal arbitral mixte dont la création et le fonctionnement remontent au ler janvier, 1920, tient aujourd'hui une assemblée générale qui marque une date dans le dévelopment de cette institution.

"Alors que vous vous préparier au cours de votre troisième année judiciaire . . . le gouvernement allemand, sous prétexte de convenances politiques, a brusquement enjoint aux magistrats nommés par lui, de refuser leur collaboration à l'œuvre que les Traités vous ont confiée.

"Une telle injonction, sous un tel prétexte, méconnaît le caractère de votre haute juridiction. Vous êtes un Tribunal. Devant un Tribunal nul n'est fondé à alléguer des convenances politiques. Devant un Tribunal, il n'y a que les raisons de droit qui vaillent . . ."

One might believe that the words pronounced and the action taken in connection with the withdrawal of the German member of the Franco-German Mixed Arbitral Tribunal can and should be repeated and applied when a similar situation arises in connection with another Arbitral Tribunal. The difference between the two instances is only that the German arbitrators were withdrawn in view of a political tension between the two countries and without reference to any case to be dealt with by the Tribunal. The Rumanian arbitrator was recalled after a decision—professedly final and obligatory—had been rendered, with respect to the particular case or cases at issue. Would this distinction be a sufficient reason for not completing the Tribunal as was done in the previous case? Such action would sanction the attitude of that party which, for some reason, interrupts the course of justice so highly lauded by the French Minister of Justice. Such reasoning is hardly conceivable.

which implies clearly that arbitration is one of the conceptions to be fostered by the League of Nations.

6. *Finally, would the acceptance by the parties of the three principles solve the actual controversy?*

The first principle states that the provisions of the Treaty of Peace do not preclude the application of an agrarian reform to Hungarian nationals and optants. The dispute, however, did not arise with respect to the applicability or non-applicability to Hungarian nationals of any agrarian reform generally, regardless of its form. However carefully one studies the oral and written arguments of the Hungarian claimants before the Mixed Arbitral Tribunal, in no place can such an assertion be found. On the contrary, it has been expressly declared on several occasions by the Hungarian representatives that *an* agrarian reform and expropriation of Hungarian nationals under the scheme of such an agrarian reform might be compatible with the Treaty of Trianon. This dispute arose with respect to certain *provisions* of *one particular* agrarian reform; provisions which, the Hungarian claimants contend, are contrary to and incompatible with those provisions of the Treaty which safeguard the property rights of Hungarian nationals and optants.

The acceptance by Hungary of this general principle enunciated by the Council would not and does not affect her complaint that certain provisions and applications of the Rumanian agrarian law are contrary to the Treaty when applied to her nationals.

As to the second principle, it should be remarked that one of the chief complaints of the Hungarian government is based on the inequality of treatment alleged to result from the extension of expropriation to absentees, which in its nature and in view of the circumstances is discriminatory as to Hungarian nationals and optants.

Concerning the third principle, which defines the meaning of the words "retention" and "liquidation" as used in the text of the Treaty, one remark present itself. These very words

have been duly interpreted recently by a highly authoritative body, the Permanent Court of International Justice.[158] The reinterpretation of these words by the Council would transfer a juridical question to the political field and would seem to imply a certain disregard of the judicial organ called into life by the Covenant itself.

When one attempts to discover the reasoning and logic by which the Committee of Three relates the question of the jurisdiction of the Mixed Arbitral Tribunal over agrarian claims to the three principles, the difficulty seems insurmountable. The Committee, after stating that the Tribunal's jurisdiction includes cases of retention and liquidation suffered by Hungarian nationals under the terms of Article 250, expressed the opinion that the Tribunal might have jurisdiction "if it could be established in any particular case that the property of a Hungarian national suffered retention or liquidation or any other measure of disposal under the terms of Articles 232 and 250." The Committee stated explicitly that such cases might fall under the jurisdiction of the Tribunal even if the infraction of property rights were effected under the terms of an agrarian law. This statement effectively destroyed the Rumanian contention that in declaring its competence, the Tribunal had exceeded its powers. In fact, the Tribunal said nothing more and nothing less than that expropriation, even under the provisions of an agrarian law, might constitute retention or liquidation within the terms of Article 250. It retained the cases for the merits, in order to establish whether there was in each case such retention or liquidation.

Having once admitted that the Tribunal *may* have jurisdiction within the limits of Articles 232 and 250 of the Treaty of Trianon over agrarian claims, it necessarily follows that the Tribunal is competent to retain claims brought

[158] Publications of the Permanent Court of International Justice, Series A, No. 7: A case concerning German interests in Polish Upper Silesia, pp. 21-22, 32-33.

under Article 250. A further step in the logical sequence would be the redelegation of the case to the Tribunal which is competent to deal with the complaint and into whose exclusive sphere of action the Treaty itself projected such claims. It is difficult to conceive on what grounds the Committee of Three proceeded to the enunciation of these three principles, which seem to bear no relation to the jurisdiction of the Tribunal. If there is any provision of the Treaty giving a power to or imposing a duty upon the Council to guide the Mixed Arbitral Tribunals in their deliberations and to pronounce legal theories or principles in accordance with which these Tribunals should administer justice, the laying down of those three principles would be pertinent and would relate directly to the jurisdiction of the Tribunal. There being nothing of this nature in the Treaty, the principles do not relate to the question of jurisdiction and seem totally irrelevant.

The acceptance of the principles would subject the competence of the Tribunal to limitations other than those resulting from the Treaty. As it has been pointed out above, it would restrict the freedom of pleading of the parties within the limits of those three principles. The pleading before a court being an integral part of its jurisdiction, it would be, indirectly, a restriction on the Tribunal itself. It would affect the jurisdiction of the Tribunal directly by prescribing principles in the light of which its business should be conducted—principles which are not expressly stated in the Treaty establishing the Tribunal, the acceptance of which would deprive the Tribunal of the privilege attributed to any independent magistrature, of interpreting the law in the light of its own reasoning and considerations. The fact that the report suggests conditioning the appointment of deputy-arbitrators on the acceptance of the principles by the parties is a further limitation on the jurisdiction of the Tribunal. Without the appointment of deputy arbitrators, the Tribunal is unable to function; to withhold such appointment is, therefore, a limitation amounting to destruction of the jurisdiction.

It may be concluded, therefore, that the acceptance of these three principles would have little, if any, practical effect on the solution of the actual dispute; that once admitting that the Tribunal may in certain instances have jurisdiction over agrarian claims, there is no relation between the three principles and the question of jurisdiction; that the three principles, particularly if their acceptance is made a condition precedent to the completing of the Tribunal, would limit the jurisdiction of the Tribunal beyond and contrary to the limits resulting from the provisions of the instrument establishing the Tribunal.

On the basis of the foregoing analysis, the following conclusions may be reached.

It seems that an inquiry into the jurisdiction of a Mixed Arbitral Tribunal falls beyond the scope of activity of the Council of the League. It is believed that while the Council may and often should interpret treaty provisions, such interpretation cannot be dictated either directly or indirectly as a guide for an international tribunal. The principles enunciated by the Committee of Three and resulting from an interpretation of the Treaty of Trianon seem to conform little if at all with the Treaty and with international law. It seems that the Council has no power whatsoever to employ sanctions against the reluctant party when acting under Article 11 of the Covenant. Article 239 seems to imply that the task conferred on the Council with respect to the establishment and completion of the Mixed Arbitral Tribunals is a mandatory or ministerial, not a discretionary function, purporting to assure the normal and unobstructed functioning of the administration of justice under all circumstances. Finally, it seems convincingly clear that the report of the Committee of Three does not suggest any constructive method for the practical solution of the controversy. Neither the acceptance by the parties of the report and the three principles, nor the suggested sanctions to be applied in case of refusal by

either party, would bring the issue a single step nearer settlement.

There remains one further point in the report which should be subjected to scrutiny. The report states that the Committee arrived at its conclusions after examining the questions which it had formulated, and after "having them examined by eminent legal authorities." One asks immediately, who were the eminent legal authorities upon whose advice the Committee arrived at its far-reaching conclusions? However, they remain unnamed throughout the report, to the great disappointment of those who lived in the belief that the League of Nations is an organization conducting its business with open diplomacy. It may be assumed that when laying down such important principles for the guidance of not one but many international tribunals—principles renouncing the juristic conception professed by the Permanent Court of International Justice—those who formulated the principles will assume full responsibility by endorsing them with their names. In the present instance they remained anonymous, and when the Hungarian representative asked their names of Sir Austen Chamberlain in open Council meeting, his question remained unanswered. According to Professor le Fur, the Committee consulted six jurists: Sir Cecil Hurst, Messrs. Gaus, Fromageot, Pilotti and Sato, and Count Rostvorowski.[159] There is no reason to doubt the truth of Professor le Fur's statement. Yet it would have been more convincing had the names of these great jurists been made known to the public in the report of the Committee of Three. Apart from the misinterpretation and errors detected in the report, the fact that it was based on the consultation of anonymous authorities seems to have discredited the reasoning and conclusions of the Committee of Three, whatever the intrinsic value of those statements and conclusions may be.

[159] Le Fur, Louis, "La réforme agraire en Roumanie et le conflit avec la Hongrie," 56 *Bulletin de la Société de Législation Comparée,* 1927, p. 437, at p. 444.

Looking at the fundamental issue in dispute, one is convinced that the proper procedure for the Council would have been to refer the question to arbitration. By doing so, the Council would act entirely in conformity with the Covenant. Article 13, paragraph 2, of the Covenant reads:

> Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.

The Council has only to apply this provision of the Covenant to the present dispute. It concerns "the interpretation of a treaty": Articles 63, 232 and 250 as well as Article 239 of the Treaty of Trianon; "questions of international law": the question of a comprehensive law applicable to the private property of aliens; "the existence of a fact which if established would constitute a breach of international obligation": the contention that the administration of the Rumanian agrarian law in fact constitutes a breach of her international obligations; the "extent and nature of the reparation to be made for any such breach": the question of compensation due to Hungarian nationals whose property was made subject to expropriation. In short, the dispute contains in its principal elements those very questions which the Covenant declared explicitly to be delegable for arbitral procedure.

It is true that the refusal of Rumania to arbitrate made it impossible for the Council to employ the procedure so clearly suggested in the Covenant. The mutual consent of the parties is the controlling element of arbitration. Lacking the necessary consent of one party, the Council should properly refer the case to the Permanent Court of International Justice for an advisory opinion. This procedure was sug-

gested several times by the Hungarian representatives, but was never followed.

It is believed that the acceptance by the Council of the report submitted and the procedure outlined by the Committee of Three will do no credit to the League of Nations. Such acceptance would be a severe blow to the cause of international arbitration. It would mean the denunciation by the Council of the League of the decision of an international tribunal presided over by a highly qualified man of unquestionable repute. It would mean that the Council assumes the rôle of an international court of appeals to which appeal can be taken from the decisions of international tribunals—appeals which can sustain, alter, or reverse existing decisions of those tribunals. It also would mean the disregard of the spirit and letter of those very treaties which established the League of Nations. Even should the Council succeed in adjusting the immediate dispute between Hungary and Rumania, still, in disregarding the decision of the Mixed Arbitral Tribunal a precedent would be established which would have an unfortunate effect upon the principle of arbitration, a principle to foster which is one of the dominant purposes of the League of Nations.

Hungary's Refusal to Accept the Report of the Committee of Three

The resolution adopted at the Council meeting of September 19, 1927, recommended the report of the Committee of Three up to and including the suggestions that the two parties be requested to conform to the three principles contained therein and that Rumania be requested to reinstate her judge on the Mixed Arbitral Tribunal. The resolution requested the parties to delay until December in stating their formal opinions, and to inform the Secretary-General of their final decision sufficiently in advance of the December meeting to allow the Council to examine what further action, if any,

might then be required. According to the wording of the resolution, "the recommendations contained in the report" were submitted "to the consideration of the Governments interested," and the Council "beg them to conform to the principles indicated therein." [160]

It was to be expected that Hungary would refuse to accept the report even in the form of recommendations. At the end of November, the Hungarian government addressed a memorandum to the Council of the League. It was stated in this memorandum that

> The Hungarian government has just submitted to a new and very minute examination of the first part of the report, and particularly the three principles of the jurists. But, to its great regret, it has to report anew that it is impossible for it to accept them . . .[161]

The memorandum then proceeds to set forth at length the reasons prompting the Hungarian government's refusal. The substance of the memorandum may be summarized briefly as follows:

It is objected, first of all, that the Council, in inquiring into the question of the jurisdiction of the Mixed Arbitral Tribunal, lays down principles limiting this jurisdiction, disregarding entirely the decision of that Tribunal with respect to its jurisdiction. It is asserted that this action of the Council is contrary to the Treaty and the Covenant; that it endangers the independence of the Tribunal; that the Council in its capacity as conciliator has no power to proceed upon such a course of action. The memorandum deals in detail with the contention of Rumania that the Mixed Arbitral Tribunal in declaring its competence exceeded its powers, and with

[160] League of Nations Official Journal, Vol. 8, No. 10, pp. 1413-14.

[161] League of Nations Doc. C. 619. 1927. VII. "Memorandum of the Hungarian government addressed on November 29, 1927, to the Council of the League of Nations, setting forth the reasons which make impossible the acceptance of the three principles of the jurists of the Committee of Three in the matter of the recall by Rumania of her national arbitrator from the Rumanian-Hungarian Mixed Arbitral Tribunal." See the memorandum printed in full in Appendix IX.

Rumania's refusal to submit this question to the Permanent Court of International Justice. It then scrutinizes the three principles contained in the report, concluding that those three principles "cannot be considered as indisputable truths beyond all doubt"—thus labeling them unacceptable for Hungary.

The Hungarian government was not alone in the opinion that the method proposed by the Committee of Three was not the most appropriate manner of settling the dispute before the Council of the League. The Rumanian-Hungarian dispute was made the subject of discussion in the House of Lords. In the meeting of November 17, 1927, Lord Newton asked the British government if it was true that "the Rumanian government had officially declared that it refused to submit the questions in dispute between them and the Hungarian government with respect to property, rights, and interests of Hungarians in land in the possession of the Rumanian government to the Mixed Arbitral Tribunal set up under the Trianon Treaty."[162] Lord Newton called the attention of the Lords to the fact that "The real gravity of the case was that one of the signatories to the Treaty had taken upon itself to say that it should be judge in its own case." He expressed the opinion that "The system of arbitration had received a very serious, if not fatal blow. This action came with singularly ill grace from the Rumanian government. Instead of allowing that government to evade obligations under the Treaty, we should be much better occupied in making them carry out those obligations."

The question put by Lord Newton was answered evasively first by Lord Cushendun and later by the Earl of Balfour, on behalf of the British government. They said that the matter was a most complex one, and was under investigation by the Council of the League, the British Foreign Secretary acting as *Rapporteur*. "The report would come up before the Council next month"—this from Lord Cushendun—"when they

[162] For all quotations from the debate in the House of Lords, see *The Times* (London), November 18, 1927.

hoped it would be possible to have the matter decided one way or the other by the Council. In those circumstances, with our own Foreign Secretary appointed to take judicial action in an international dispute, it would not be possible or proper for the government, in anticipation of what might then occur, to go into the merits of the case and to express any opinion at all."

There were members of the House of Lords, however, who found the government's reply unsatisfactory. Lord Buckmaster, for instance, expressed the opinion that to him the case seemed less mysterious and complex than represented by Lord Cushendun. He, supported by Lord Carson and Lord Phillimore, while not speaking of the merits of the dispute, voiced their view that the League of Nations should act in strict accordance with the provisions of the Covenant. All three condemned Rumania's refusal to submit to the decision of the Mixed Arbitral Tribunal.

Perhaps it was the evasive answer of the British government which induced several members of each house of Parliament to address, a few days later, the following letter to the Editor of *The Times:* [163]

Sir,—The question of disarmament, which is being debated at the meeting of the Council of the League of Nations at Geneva, may tend to divert attention from another question which is to be debated by the Council, and is of world-wide importance. As will be recollected, the Rumanian Government, being dissatisfied with a preliminary judgment of the Mixed Arbitral Tribunal affirming its power to entertain certain claims lodged by Hungarian nationals, owners of property in Transylvania, against the Rumanian Government, withdrew its arbitrator from the Tribunal and thereby prevented it from further considering the case. The preliminary judgment in question was given by the Tribunal after full argument. The merits of the dispute need not, and indeed, ought not to be discussed here; what is of importance is the very serious situation brought about by the action of Rumania. That country was party to the Treaty which instituted the Tribunal to decide disputes, and action of this kind would be fatal to the whole principle of international arbitration.

Nor does the matter rest here. By the Treaty the Council of the League has the duty of taking steps to enable a vacancy on the Tribunal to be filled in the event of either of the Governments concerned refusing to do so, and it was duly requested by the Hungarian Government to take those steps. This same course was adopted, in fact, when the German Government withdrew its arbitrator from the Franco-German Mixed Arbitral Tribunal as a protest against the Ruhr occupation, and both parties accepted the judgments of the Tribunal so reconstituted and acted upon it. Unfortunately this course has not yet been followed in the Hungarian-Rumanian dispute. No doubt under the Covenant it was right for the Council to act as mediator between members of the League and try to induce the parties to come to terms. But this fact does not take away the right, failing agreement, of the Hungarian nationals to have their case judicially decided or relieve the Council of its duty under the Treaty with regard to the Tribunal—still less does it entitle the Council to impose on one of the parties to the dispute, as a condition, that it should give up beforehand one of the principal points on which it relies under the terms of the Treaty.

Unless an unprejudiced trial can be had before the Tribunal constituted by the Treaty without being prejudiced by conditions imposed in advance on the parties or the Tribunal, the result would be that any signatory to a treaty can disregard or evade the treaty provisions relating to the arbitrament of a Mixed Arbitral Tribunal. The whole system of deciding disputes by impartial tribunals acting judicially in accordance with the terms of engagements solemnly made and with the principles of international law would consequently receive a fatal blow. What, then, will be the value of treaties in general and treaties for arbitration and international arbitration in particular?

We are, Sir, yours, etc.,

Buckmaster
Carson of Duncairn
Charnwood
Newton
Sydenham of Combe
Robert Gower
Malcolm M. Macnaghten
T. C. R. Moore
R. Hopkin Morris

Houses of Parliament, December 2

[163] *The Times* (London), December 5, 1927.

Hungary Proposes Direct Negotiations

The debate in the House of Lords and the above-quoted letter written by members of each house of the British Parliament seem to be a powerful justification of the attitude taken by Hungary with regard to the report of the Committee of Three. The refusal to accept the report seems dictated by sound principles, and not by an unyielding attitude resulting from lack of a conciliatory spirit, as was charged by Sir Austen Chamberlain during the heat of the discussions before the Council.[164] The Hungarian government gave further proof of her willingness to adjust the controversy amicably by proposing direct negotiations with Rumania. Prior to the delivery of the memorandum to the League, the following communication was addressed by the Hungarian Legation in Bucharest to the Rumanian government:[165]

Bucharest, November 15, 1927

Monsieur le Ministre,

By order of my Government, I have the honor of informing Your Excellency concerning the following:

In the matter of the appointment of deputy arbitrators to the Rumanian-Hungarian Mixed Arbitral Tribunal, the Council of the League of Nations at its meeting of September 19, last, invited Hungary and Rumania to "delay until December their opinion" concerning the three principles of the report and not to make known until then to the Secretary-General "their final decision."

The Hungarian Government submits a report forthwith to the effect that it will be impossible for it, even after a new and detailed examination of the question, to accept the three principles contained in the report. The Hungarian Government will not fail to communicate to the Council the reasons for this impossibility.

Nevertheless, it is anxious to give proof once more, at this time, of its goodwill and conciliatory spirit, in addressing the Rumanian

[164] League of Nations Official Journal, Vol. 8, No. 10, p. 1407.

[165] This document was attached as Annex B to the Hungarian memorandum of November 29, 1927, to the League of Nations. *Supra,* note 161. Author's translation.

Government directly, through its present letter, in order to reach with it an amicable settlement of the affair by the conclusion of an agreement.

This agreement should and could, in the opinion of the Hungarian Government, avoid touching questions of principle, but it should be based on an exact knowledge of the reality of facts and on practical considerations; likewise it shall have in view only practical results.

It remains understood, in all circumstances, that no conclusions shall be deduced from this proceeding of the Hungarian Government as to any surrender whatsoever on its part of the principles and rights invoked or sustained in this case up to the present.

The agreement to be concluded could nevertheless admit of a definitive settlement of the controversy which would be in the interest of all the parties to the case. It could not consider the modification of the Treaty of Trianon, but it should be a simple compromise concluded between the litigant parties themselves—that is to say, between the Rumanian Government and the Hungarian claimants, on whose behalf, however, the Hungarian Government will be ready to act, as their mandant, at the conclusion of the agreement; this, above all, to insure efficiency.

The general tenor of the compromise could be the following:

The Hungarian claimants would not require the restitution of tillable lands and meadows which are in the possession of the parties holding title. To forests, vineyards, fruit-gardens, buildings and other improvements, this privilege would not, as a general rule, be extended in view of the fact that those have not been expropriated by way of agrarian reform in the other provinces of Rumania, but in Transylvania only, and that they were not distributed among the peasants but, for the most part, still remain and continue in the possession of the State.

The parcels of land and other property which Rumania uses for the purpose of her agrarian reform and which, according to the preceding, would not be subject to restitution, ought to be indemnified at a rate less than full compensation, the fixation of which should be the subject of more detailed negotiations. During the course of these negotiations an equitable compromise could be arrived at with respect to the modes of payment of compensation.

The Hungarian Government expects on the part of Rumania a sincere spirit of conciliation corresponding to that with which Hungary is motivated, and in view of the short time remaining until the next

session of the Council, it asks the Rumanian Government to give an answer to its present overture as soon as possible.

I beg Your Excellency to accept the assurance of my highest considerations.

F. Villani
Minister Plenipotentiary of Hungary

His Excellency
M. Nicolas Titulesco
Minister of Foreign Affairs of Rumania
Bucharest

The December meeting of the Council postponed discussion concerning the Rumanian-Hungarian dispute until its next meeting, in March, 1928, partly because of the illness of M. Titulesco and partly in view of the Hungarian proposal. Before the Council met, and on his own initiative, Sir Austen Chamberlain, as Rapporteur for this controversy, sent a telegram to the Rumanian government asking that M. Titulesco do nothing which would endanger his health. The Council subsequently approved Sir Austen's action, after which the Secretary General wired to M. Titulesco:[166]

Council decided this morning to adopt the telegram which the Rapporteur sent you today in his own name. The Council would be unwilling for you to undertake the journey in the present state of your health and pending the complete examination by your Government of the proposal for direct negotiations between the parties without prejudice to their legal position or to the procedure before the Committee of Three and the Council.

Drummond

The substance of Rumania's answer to the Hungarian proposal to end the dispute with an amicable settlement, was revealed during the discussion which took place at the forty-ninth session of the Council, held in March, 1928.[167] Count

[166] See League of Nations Official Journal, Vol. 9, No. 2, p. 112.

[167] When this book went to press, the proceedings of the forty-ninth session of the Council had not yet been published in the League of Nations Official Journal. The subsequent quotations are taken from the provisional minutes of the fifth, sixth, seventh, and eighth meetings, held on March eighth and ninth, respectively.

Apponyi stated that the Hungarian government, to its great regret, was unable to accept the report of the Committee of Three, for the reasons set forth in its memorandum to the Council, dated November 29, 1927. Referring then to the offer made by Hungary to settle the dispute by direct negotiations, Count Apponyi stated that the reply of the Rumanian government had been given only a fortnight before the Council meeting. His summary of the text of the Rumanian reply follows:

> In the first place, the Rumanian government requires as a preliminary and indispensable condition, admitting of no discussion, that the Hungarian government should accept purely and simply the three principles contained in the recommendation made by the Council, that is to say, the principles with which the Hungarian government cannot associate itself, as it has already explained. If that preliminary condition were fulfilled, the Rumanian government would be ready to renounce a certain part of the payments due to it out of a sum of approximately ten million francs paid annually by Hungary as reparation between the years 1923 and 1943. The Rumanian government in its note vaguely allows it to be understood that in 1943 some kind of concession might ultimately be made regarding the share which the Reparation Commission might decide was then due and regarding the share which would be given. Thirdly, the Rumanian government declares that no kind of material concession can be made.

Count Apponyi declared the Rumanian reply unacceptable to Hungary. His government proposed an extra-legal solution, allowing each party to maintain its legal point of view. The Rumanian reply, however, considered the acceptance of the report of the Committee of Three an unequivocal preliminary to any settlement, thus requiring Hungary to renounce her legal point of view. On the other hand, the Rumanian offer, that a part of the reparations payment made by Hungary be remitted and used for the compensation of optants, was considered unsatisfactory—the more so because, in the estimation of the Hungarian government, the problem of reparations cannot be coupled with the question of the optants.

Involved in the former case are obligations of the Hungarian *state* to the Rumanian *state;* in the latter, obligations of the Rumanian *state* to Hungarian *nationals individually.*

Establishing that no agreement can be brought about on such a basis, Count Apponyi concluded:

> Faced with this position, the Hungarian government can only repeat the request which it has made to the Council. Since the means of conciliation have been exhausted, the only possible procedure is that laid down by Article 239 of the Treaty of Trianon and its Annex. This consists in appointing persons belonging to states neutral during the war, from among whom the substitute judges, to replace the judge whom Rumania has recalled, will be appointed, unless Rumania changes her mind and is ready to install her judge anew, which I hope with all my heart.

He also renewed the proposal made by Hungary at previous meetings of the Council—namely, that the question of usurpation of powers by the Mixed Arbitral Tribunal be submitted to the Permanent Court of International Justice. Should this proposal meet with refusal on the part of Rumania, Count Apponyi suggested that the Permanent Court be asked to give an advisory opinion, the question being whether the three principles laid down in the report of the Committee of Three are to be deduced from the obligations assumed by Hungary and Rumania in virtue of the Treaty of Trianon.

Following Count Apponyi's statements, M. Titulesco set forth the Rumanian contention, which may be summed up in the following manner:

The only possible way to settle the dispute is that suggested by Rumania—namely, the coupling of the question of the optants with the question of reparations. On the other hand, the dispute does not, as asserted by Hungary, involve legal problems alone; it also touches the sovereignty of Rumania. As Rumania is under no compulsion to arbitrate, no one can ask her to do so against her will. Going before the Permanent Court of International Justice would mean arbitration,

and Rumania refuses to arbitrate this question, in view of the social upheaval which such an arbitration might cause in that country.

The New Proposal of Sir Austen Chamberlain

The exchange of views between the representatives of Hungary and of Rumania convinced the Council that the report of the Committee of Three is not a suitable basis for conciliation. In summing up the situation, Sir Austen, as Rapporteur, said:

> Our proposal for a friendly solution to be arranged between the parties has failed to produce any result because, in the first place, Hungary, which was ready to make a proposal for compromise, still found it necessary to refuse to accept the principles to which the Council had asked the parties to conform; and because, on the other hand, Rumania, accepting in full these principles for herself, demanded that they should be accepted by Hungary as a preliminary to any arrangement. It further transpires from what has been said that the parties were separated by a gulf which, if not unbridgeable, at any rate no attempt to bridge it was made. The gulf concerned the question of the amount of compensation and the sources from which it should be derived, if any scheme of arrangement were reached. In fact, the parties are today exactly where they were when the Council separated in September last.

Expressing the opinion that "the Council has no power to impose a decision on either of the parties," Sir Austen brought to the consideration of the members of the Council other than the interested parties a suggestion which may solve the difficulty. He proposed that the Mixed Arbitral Tribunal should be increased from three to five members for the purpose of considering claims submitted by Hungarian nationals under Article 250 of the Treaty of Trianon. These two additional members were to be named by the Council from nationals of states which remained neutral during the war.

The members of the Council, in commenting upon this proposal of the Rapporteur, unanimously adhered to it as

promising to bring about a solution of the dispute, at the same time safeguarding the principle of arbitration and the independence of international magistratures. A particularly appealing address was made by M. Briand, the Foreign Minister of France. "So far as I am concerned," said M. Briand, "I adhere to it [the proposal] and I urge its adoption. It has the advantage of not running counter to any of the theories which have been put forward. The principle of arbitration is maintained in the form provided for in the Treaty, and yet at the same time we have found a means of making use of our [the Council's] rights. . . . I think that the proposal which our Rapporteur, Sir Austen Chamberlain, has laid before us is perfectly reasonable. I entirely approve it and I hope that, when it has been adopted unanimously by the Council, and as such offered to the two parties, they will be good-natured enough to accept it."

After the members of the Council, other than the interested parties, expressed their unanimous approval of Sir Austen's suggestion, it was formally submitted to the Council for adoption, and at the afternoon meeting the representatives of Hungary and Rumania were invited to indicate their opinions.

M. Titulesco said that he considered Sir Austen Chamberlain's proposal as supplementary to the report of the Committee of Three and that he would accept the new proposal *on the condition that the two supplementary judges would be bound by the three principles embodied in that report.* His argument, which he expounded at length, was that since the Council considers it within its competence to propose that there should be two extra judges on the Mixed Arbitral Tribunal, then the Council also has the right to determine the conditions under which it shall appoint the judges. Rumania, he contended, can accept arbitration only within the guarantee of the three principles laid down in the report of the Committee of Three. He therefore proposed that the suggestion of Sir Austen should be added to the report as an amendment;

but, if the two supplementary judges were not to be bound in advance by those three principles, he, according to the precise instructions of the Rumanian government, must refuse the acceptance of the new proposal.

Count Apponyi declared that the Hungarian government gives its complete adherence to Sir Austen Chamberlain's proposal in the form in which it was put forward in the morning session.

Thus, the proposal was accepted by Hungary unconditionally. It was accepted by Rumania only on the condition that the two additional judges be bound in advance by certain rules. This conditional acceptance by Rumania, as Sir Austen himself stated in the ensuing discussion, "in fact, constitutes not an acceptance but a refusal of the recommendation made by the Council. . . . I think it would be improper and even insulting to attempt to attach to the nomination of the two new judges conditions which no one proposes to attach to the original members of the Tribunal."

It was M. Briand who put in plain words the meaning of the condition upon which M. Titulesco was willing to accept Sir Austen's proposal. He said:

> What is it our friend and colleague, M. Titulesco, wants? I urge him to reflect on the condition which he seems to impose before accepting our suggestion. Two new judges are to be appointed to enlarge the Tribunal in order to give it greater authority, while still preserving its character as an arbitral tribunal. This Tribunal is faced with a resolution interpreting the agreement to arbitrate. M. Titulesco says that we must go a step further and that the two judges to whose great authority we are about to turn for aid, must undertake in advance to accept our interpretation of the Treaty. I am not quite sure, but I think he went so far as to ask that we should take the precaution of requesting these judges to sign our interpretation in advance.
>
> If that is so, I will turn to my friend, M. Titulesco, and ask him whether, if we found independent lawyers, magistrates worthy of the name, ready before sitting on an arbitral tribunal, to bind themselves by signing such a document, he would consider them worthy of his

confidence? My own reply is, No! A man who agrees to sit as a judge on an arbitral tribunal, if he bound himself by such an undertaking, would not be worthy of so important a task.

M. Titulesco replied that his government would not be able to adhere to this proposal without the condition he had put forward. This form of solution had also been suggested in the Committee of Three, and his government at that time had taken a firm stand against it. He was strongly urged by Sir Austen Chamberlain, M. Briand and Dr. Stresemann to submit the proposal to the consideration of his government. Sir Austen expressed confidence that Rumania would take a different attitude toward this present proposal, for it now stands as the wish of the whole Council, and not as the suggestion of the Committee of Three. M. Titulesco said that he would forward the proposal to his government "out of courtesy," but, he continued, "I feel that I have expressed the views that Rumania holds today and will hold tomorrow."

After a private session of the Council, a resolution was adopted by the Council at the proposal of the President, Mr. Urrutia. This resolution was accepted on behalf of Hungary, by Count Apponyi. M. Titulesco refrained from voting.

The resolution reads:

The Council,

Considering that the best method of settling the dispute was by friendly negotiation between the two Parties, recommended that method to them in September, 1927, and stated three principles which in its opinion might serve as an equitable basis for this negotiation;

Finding, however, that such friendly negotiation has not been possible between the parties, the Council, while considering its recommendations of September 19, 1927, to be of value, and without modifying its views which are contained in the minutes of its discussion, submits unanimously for the acceptance of the parties the following recommendation:

"That the Council should name two persons, nationals of states which were neutral in the war, who should be added to the Mixed Arbitral Tribunal as established by Article 239 of the Treaty of Trianon (that

is to say, that Tribunal including a Rumanian member, who would be restored to it by his government), and that to this Arbitral Tribunal of five members there should be submitted the claims which have been filed under Article 250 of the Treaty of Trianon by Hungarian nationals which have been expropriated under the agrarian reform scheme in the territory of the former Austro-Hungarian Monarchy transferred to Rumania."

The Council requests the representatives of the Hungarian and Rumanian governments to inform it at its next session of the replies of those governments, and decides at once to insert the question on the Agenda of that session.

CONCLUSION

It would seem that this resolution of the Council constitutes a step toward solving the problem in the way in which it should be solved: by judicial procedure. Whereas the recommendations of the report of the Committee of Three presented in September, 1927, if followed, would have dealt a decided blow to the administration of international justice, the present resolution contains a constructive proposal tending to reëstablish and ensure the normal functioning of the Mixed Arbitral Tribunal within whose jurisdiction lies the meritorious settlement of those claims causing the Rumanian-Hungarian controversy. The firm stand for the cause of international arbitration, taken by the members of the Council and particularly by M. Briand, will be a reassurance to those who feared that the independence of international magistrature would be endangered should the procedure suggested by the report of the Committee of Three be followed. It may be hoped that there will be no confusion between the recommendations of the Council contained in the report of the Committee of Three —recommendations which resulted from an attempt to conciliate, and which, according to Article 11 of the Covenant, the parties were free to accept or reject; and this last resolution—a resolution resulting from a duty imposed upon the Council by Article 239 of the Treaty of Trianon, the performance of which is independent of the will of any of the parties. It may be hoped also that the Council will proceed, at its next session, to the appointment of the two additional members, and that Rumania will reinstate her national judge without the imposition of any previous conditions. Any such conditions, it seems, would impede, and perhaps ultimately destroy, the administration of international justice.

In any event, until this procedure is followed, students of

international law are confronted with two vital questions of principle:

1. How far, if at all, can the Council of the League of Nations interfere with the administration of international justice?

2. In case such interference in fact takes place: What effect will this interference have on the development of international arbitration?

These are the two fundamental questions involved in the Rumanian-Hungarian dispute while it is before the Council of the League—questions which obviously carry more import in relation to the progress of international law in general than they do in relation to the contentions of the parties to the particular controversy.

APPENDIX

I

Note of the Hungarian Government to the Conference of Ambassadors, dated August 16, 1922.

(Printed in full from the French text as it appears in "Recueil des Actes et Documents relatifs à l'affaire de l'expropriation par le Royaume de Roumanie des biens immobiliers des Optants Hongrois," published by the Hungarian Foreign Office, Budapest, 1924, pp. 15-16.)

Légation Royale de Hongrie
à Paris.

Paris, le 16 août, 1922.

A La Conférence des Ambassadeurs
à Paris.

Monsieur le Président,

D'ordre de mon Gouvernement, j'ai l'honneur de soumettre à la Conférence des Ambassadeurs l'affaire suivante.

Les autorités roumaines viennent de saisir en leur totalité les propriétés immobilières des personnes qui ont opté en dû temps pour la nationalité hongroise, entre d'autres: Emeric Kulin, Arpád Kemény, Baron Zoltán Bánffy, Comte Paul Teleki, etc.

Les autorités roumaines prétendent avoir agi aux termes soit de la loi agraire à titre *d'absentéisme,* soit de l'article 7 de la Constitution de l'ancien Royaume de Roumanie qui défend aux *étrangers* de posséder des terres en Roumanie.

Tel procédé est une flagrante violation des dispositions explicites de l'article 63 du Traité de Paix de Trianon, selon lequel: "Les personnes ayant exercé le droit d'option . . . seront libres de conserver les biens immobiliers qu'elles possèdent sur le territoire de l'autre Etat où elles auraient eu leur domicile antérieurement à leur option."

La Roumanie aurait dû conformer ses lois internes aux stipulations des Traités internationaux auxquels elle a souscrit, même si elle avait possédé des lois antérieures qui eussent été en contradiction avec ses obligations internationales. Elle aurait dû le faire en vertu de la nature

même de toutes obligations internationales, à savoir: que les traités internationaux obligent la personne morale de l'Etat contractant en son intégralité.

Mais au lieu de conformer sa législation antérieure aux dispositions des Traités, la Roumanie a créé de nouvelles lois et ordonnances qui sont en flagrante contradiction avec ses obligations internationales. La nouvelle loi agraire contient des dispositions quant à l'absentéisme qui en tant qu'elles s'appliquent aussi aux personnes qui ont exercé leur droit d'option, sont en contradiction absolue avec les Traités. En outre, la Roumanie veut étendre le cercle d'application de l'article 7 de son ancienne Constitution, en l'introduisant aussi dans le territoire de la Transylvanie où préalablement elle n'etait pas en vigueur.

Sans entrer dans la question de l'indemnité que les lois roumaines font espérer pour les propriétés agraires expropriées, cette indemnité est pour le moment tout au plus 5% de la valeur réelle et même cette somme n'est pas payée au comptant, mais en bons d'Etat intransmissibles.

Ces expropriations et ces indemnités sont en contradiction aussi avec les exigences que les Etats civilisés d'Europe ont érigées en principe à la Conférence de Gênes et de la Haye à l'égard de l'inviolabilité de la propriété privée.

Le Gouvernement Royal Hongrois a déjà protesté à plusieurs reprises auprès de l'Etat Roumain contre les measures arbitraires de sa législation agraire, mais toutes ses démarches sont restées infructueuses.

Vu ces circonstances, le Gouvernement Royal Hongrois se voit forcé d'adresser à la Conférence des Ambassadeurs la demande de bien vouloir intervenir auprès du Gouvernement Roumain afin qu-il conforme sa législation et son attitude, quant aux biens immobiliers des personnes qui ont opté en faveur de la nationalité hongroise aux dispositions explicites de l'article 63 du Traité de Paix de Trianon.

Le Gouvernement Hongrois croit devoir d'autant plus attirer l'attention de la Conférence des Ambassadeurs à ces faits indéniables, qu'il s'est, sous tous les rapports, conformé aux exigences du Traité de Trianon, et a satisfait même à l'injonction de la Conférence des Ambassadeurs en une matière législative qui n'etait pas prévue par le texte du Traité.

Le Gouvernement Hongrois ose espérer que la Conférence des Ambassadeurs sera guidée vis-à-vis de la Roumanie par le principe qui

demande le respect absolu des obligations internationales. Les Traités formant une unité, il est d'avis que la lésion d'une de leurs dispositions ébranlerait nécessairement toutes les garanties qu'ils contiennent.

En portant ce qui précède à la connaissance de Votre Excellence, je La prie de bien vouloir en saisir la Conférence des Ambassadeurs.

Je profite de cette occasion pour renouveler à Votre Excellence les assurances de ma plus haute considération.

Signé:
Hevesy
Chargé d'Affaires.

II

Account of the Conversations which took place on May 27, 1923, at the Palace Hotel, Brussels, between Count Csáky and M. Gajzágó, Representatives of Hungary, and M. Titulesco, Representative of Roumania, in the Presence of Dr. van Hamel, Director of the Legal Section, M. Mantoux, Director of the Political Section, and M. Ascarate and M. de Montenach, Members of the Secretariat of the League of Nations.

(Printed in full from the League of Nations Official Journal, Vol. 4, No. 8, pp. 1012-14.)

It was agreed to take as the basis of discussion the various points raised by the Hungarian request. These were as follows:

(1) Discrepancy between the Roumanian agrarian law and the provisions of the Treaty of Trianon laying down the right of Hungarian optants to keep their immovable property situated in territory ceded to Roumania.

(2) Aggravation of the wrong caused to Hungarian optants in consequence of the provisions regarding absenteeism laid down in Roumanian law in force in Transylvania:

(a) Discrepancy between the provisions of the Treaty compelling Hungarian optants to transfer their domicile outside Roumanian territory and the provisions of Roumanian law in Transylvania, providing for the total expropriation of owners who have been absentees for a prescribed period;

(b) Cases of Hungarian optants who have been absentees for the period provided by law owing to *force majeure* resulting from the occupation of the territory by Roumanian troops.

(3) The question of the amount of compensation to be allowed to expropriated property owners. If prices based on those of 1913 are adopted, Hungarian optants will lose the difference between the normal value of the expropriated property, as estimated on the figures for that period, and its actual value to-day.

(4) Provisions of Article 18 of the Roumanian Constitution.

This article lays down that Roumanian subjects may acquire or keep country estates in Roumanian territory, foreigners only having the right to compensation. The Hungarian representatives regard this as a fresh menace to the interests of Hungarian optants, including those to whom the agrarian law applies.

(5) Interpretation by the Hungarian representatives of the following words on page 5, paragraph 3, of their Government's request:

"There are doubtless a number of other provisions of the Roumanian agrarian law which injuriously affect the rights of Hungarians who exercise their right to opt . . ."

In support of this statement, the Hungarian representatives bring forward the following five points:

(a) Article 10 of the law on agrarian reform in Transylvania, in connection with the articles to which it refers.

(b) Article 24, which provides for exceptions to the agrarian reform in favor of the regiments of Roumanian ex-frontier guards, but makes no such exception in favor of the former Czekler frontier guards.

(c) The very small maximum quantities of land (10, 30 and 50 jugars), which are unreasonable from the point of view of economic and social reform.

(d) The normal maximum, 200 jugars, which is also too low. (This maximum was 500 hectares in the former territory; in general, the maxima fixed in hectares in the former territory and in jugars in Transylvania, a jugar being equivalent to 0.575 hectares.)

(e) The fact that in many cases no compensation whatever is given under the agrarian law of Transylvania for cases in which a landowner has to submit, as an exceptional measure, to the application of a more rigorous legal provision than usual, whereas the law of the former territory provided a special indemnity for such a case, as, for example, in the case in which the exceptional maximum of 100 hectares is applied if there is a great need of land.

(The statement of these five points is reproduced here as given by the Hungarian delegation.)

(1) As regards the question of the discrepancy between Roumanian law and the provisions of the Treaty which deal with the rights of Hungarian optants, it is admitted—and the Hungarian representatives do not dispute the point—that the Treaty does not preclude the ex-

propriation of the property of optants for reasons of public welfare, including the social requirements of agrarian reform.

(2) The question of absenteeism:

(a) As regards the discrepancy, alleged in the Hungarian request, between the compulsory transfer of the residence of Hungarian optants and the increase in the measure of expropriation on account of absence, it should be noted—and the Hungarian representatives do not deny the fact—that the period of absence provided for by the law was not identical with the period fixed in the Treaty. It was therefore not impossible from the legal point of view for optants to be in the ceded territory during the period referred to in the Transylvania agrarian law. The Hungarian representative pointed out, however, that, for reasons which were partly psychological, a large number of future optants were obliged to transfer their residence earlier than they had intended. He was therefore convinced that this circumstance had moral and legal value.

The Roumanian representative pointed out that, as was confirmed in the Hungarian Government's request, there was no logical, physical or legal impossibility.

(b) Optants who were not able to return to the ceded territory owing to the Roumanian occupation (*force majeure.*)

The Roumanian representative pointed out that this question brought the discussion outside general legal questions, since it only referred to individual cases, to which the request did not apply, and that these questions could only be raised at the proper time and before the proper authorities.

The Hungarian representative considered that the question was of general concern, as it showed that the agrarian law of Transylvania was not impartial, since the period provided in that law was fixed in such a way as to penalize persons who, by *force majeure,* were prevented from returning.

The Roumanian representative denied that the law was not impartial; he maintained that the provisions of the law were not more severe than other provisions of Roumanian agrarian law.

Finally, he declared that he himself had never encountered any individual case of this kind and that no concrete instance of such a case had been cited in the Hungarian request.

In his view, therefore, they could not deal with this question.

Nevertheless, if such cases had occurred and had not been settled by means of a judicial decision, the Roumanian representative was sure that the persons concerned would be accorded full justice within the limits of the Roumanian law and of cases which had already been definitely settled.

(3) The question of prices (fixing of prices and nature of the compensation allowed).

The Roumanian representative recalled his arguments on this point. There was only one price for all—the only price which was possible and which did not amount to confiscation. This was annual payment which was intended to become equivalent to the value in gold; there was therefore a deferred price, based on the gold value. If the prices claimed by the Hungarian Government were allowed, it would be equivalent to imposing at once upon the Roumanian Government an annual payment amounting to about two and a half times the entire Roumanian budget.

As regards details, the Hungarian representative referred to his statement to the Council. He was of opinion that so-called deferred payment in gold was out of the question. As regards expropriation, the only possible method would be that of cash payments.

M. Mantoux pointed out the undoubted difference between expropriation for the public welfare in the ordinary sense of the term (for sewage works, etc.) and a general measure of expropriation, amounting to a revolutionary measure. Complete compensation, which would be the rule in the first case, might become impossible in the second.

The Hungarian representative pleaded the application of the principle upheld by France at the Genoa Conference with regard to French property confiscated in Russia. Hungary asked for a full indemnity. She could not regard the payment of prices obtaining in 1913 as equivalent to compensation. Short of compensation equal to zero, i.e. confiscation, Hungary considered that compensation of 1 per cent. was equivalent to confiscation of 99 per cent.

The Roumanian representative asked the Hungarian representative to explain his point of view. If a higher price were claimed in favor of Hungarian optants, this would mean that the Roumanian Government would be granting them a privilege, and this it refused to do. On the other hand, if the Roumanian Government were asked to grant

the benefit of this increase in price to all the persons concerned, could it possibly be expected to make immediate payment of fifteen milliards in gold, or gold values equivalent to 750 million francs, that is to say, three times the total Roumanian budget, merely in order to meet the annual cost of expropriation?

The price in lei would increase in proportion to the improvement in the general economic situation of Roumania. If it were not thought possible for that country to make payment in gold within fifty years, how could she be expected to make immediate payment on a gold basis?

The Hungarian representative recalled the fact that, under the Treaty, optants were authorized to export their movable property. If, however, their immovable property was, whether they wished it or not, converted into annual payments, they would find it impossible to export it. Nevertheless the Hungarian representative stated, on behalf of his Government, that, in order to show a spirit of goodwill and conciliation, he was prepared to make certain concessions, and—in the hope of reaching an understanding—to accept a proposal for indemnity 100 per cent. lower, in consideration of the present difficulties with which Roumania was faced; but he could not possibly accept compensation of 1 per cent.

The Hungarian representative inserted the following declaration:

"The Hungarian representative desires to point out that the meeting at Brussels was held for the purpose of showing a conciliatory spirit and reaching a settlement by compromise and of discovering a solution of the matter by means of an agreement in which both parties would make certain concessions. He takes this opportunity of declaring solemnly on behalf of his Government that he is most desirous of entering into negotiations with the representative of Roumania on the two essential points of the dispute, namely, the limit of expropriation and the amount of compensation to be granted to Hungarian optants. He assures the Roumanian representative that he will be met with the utmost goodwill and a most conciliatory spirit on the part of the Hungarian negotiators, who have been furnished with full powers to treat regarding these questions."

The Roumanian representative inserted the following declaration:

"The Roumanian representative appreciates the sentiments expressed by the Hungarian representative. He feels bound to point out, however, that what the latter proposes as a concession actually amounts,

in point of fact, to granting privileges to Hungarian optants at the expense of the Roumanian landowners of Transylvania. To fix, in the case of Hungarian optants, a different limit of expropriation and a greater measure of compensation than that allowed to Roumanian property owners does, in fact, constitute a privilege. The compromise suggested by the Hungarian representative is merely a formal one and consists in reducing more or less the material limits, i.e. the extent of the privilege granted, in order to secure indirect recognition of the principle."

The two representatives considered it inadvisable to continue the discussion on the question of the redemption price; no compromise appeared possible between their respective points of view, because the Hungarian representative considered the amount of compensation too small, and asked that the value of the expropriated lands should be allowed for, and the Roumanian representative contended that Hungarian optants could not be granted greater compensation than that accorded to Roumanian subjects.

(4) Article 18 of the Roumanian Constitution.

The Roumanian representative indicated that, subject to the results of the negotiations, he was considering the possibility of making certain statements to the Council on this point.

(5) Other provisions of the agrarian law which injuriously affect the rights of optants.

It was considered that the statement communicated by the Hungarian representative could not be held to prove that the interests of Hungarian optants had suffered in other respects, since the right of Hungarian optants to avail themselves of the provisions of the law of the former Kingdom in proof of injury to interest could not be allowed.

To this the Hungarian representative replied that the statement in question, which drew comparisons between the provisions of Transylvania agrarian law and the agrarian law of former Roumania was intended solely for reference.

The Hungarian representative admitted, therefore, that the various points in question would have to be presented anew if he considered it necessary to bring these fresh arguments separately before the Council, as they had not been included in his original request.

Dr. Van Hamel indicated that, should the Hungarian representative

think it advisable to bring these fresh questions before the Council, the latter might recommend that the cases connected therewith should be settled by means of direct diplomatic correspondence.

The declarations of the Roumanian representative referred to in the present report under paragraph 4 are worded as follows:

(a) "Hungarian optants who have already been subjected to measures of expropriation under the agrarian law are afforded a guarantee that they may keep the immovable property which they still possess, notwithstanding the provisions of Article 18 of the Roumanian Constitution.

(b) "If, in practice, other circumstances being equal, the agrarian law of Transylvania has been interpreted in a different manner for Hungarian optants than for Roumanian subjects, each individual case, when brought to the notice of the Roumanian Government, will be considered separately, in order to ensure equal treatment for all in conformity with the intentions of the law."

III

Aide-Mémoire of the Hungarian Government, dated June 12, 1923.

(Printed in full from the French text as it appears in "Recueil des Actes et Documents relatifs à l'affaire de l'expropriation par le Royaume de Roumanie des biens immobiliers des Optants Hongrois," published by the Hungarian Foreign Office, Budapest, 1924, pp. 62-63.)

Dans l'affaire de l'expropriation, par le Gouvernement roumain, des biens immobiliers appartenant aux optants hongrois, le Conseil de la Société des Nations a décidé, en sa séance tenue le 23 avril a c., de renvoyer la question à sa prochaine session, et il a donné en même temps expression à sa conviction que, dans l'intervalle, les Gouvernements de Hongrie et de Roumaine s'efforceront de leur mieux d'aboutir à un accord.

Pour tendre à ce but, les délégués des Gouvernements hongrois et roumain avaient entamé, à Genève même, immédiatement après la clôture de la session d'avril, des pourparlers préliminaires, et il y avait question déjà à Genève de la continuation de ces pourparlers sous la forme de négociations officielles entre les représentants des deux Etats à Bruxelles, siège de Son Excellence M. Adatci, Ambassadeur du Japon, rapporteur de l'affaire au Conseil de la Société des Nations.

Conformément à ce projet et à la décision du Conseil, les délégués de la Hongrie et de la Roumaine furent invités vers la mi-mai, de se rendre à Bruxelles pour le 26 mai a. c.

Le Comte Emeric Csáky, Ex-ministre des Affaires étrangères, et le Conseiller Gajzágó furent désignés délegués du Gouvernement de Hongrie à ces négociations avec le Représentant de Roumanie. Ils furent munis du plein pouvoir dont l'original est ci-annexé, et dont il ressort clairement que les délégués étaient autorisés seulement "de représenter le Royaume de Hongrie au cours des négociations qui seront entamées au sujet de l'expropriation des biens immobiliers des optants hongrois, le 26 mai de l'année courante à Bruxelles entre le Royaume de Hongrie et de Roumanie." Des instructions se référant uniquement

à un accord à conclure éventuellement avec la Roumanie au fond de l'affaire, leur furent données.

Le Gouvernement royal de Hongrie vient d'entendre le rapport verbal et de lire le rapport écrit, que ses délégués, retournés de Bruxelles, lui ont faits sur la marche des négociations.

Le Gouvernement royal Hongrie a appris de ce rapport que les négociations directes essayées entre les Représentants des deux Gouvernements, d'abord sans intervention, ensuite avec intervention de quelques fonctionnaires du Secrétariat de la Société des Nations—qui se sent rendus également à Bruxelles—sont restées sans résultat. Cet échec des négociations est constaté dans le procès-verbal qui enregistre la marche des négociations poursuivies avec l'intervention desdits fonctionnaires et dont copie fut remise au Gouvernement royal par ses représentants.

Mais le Gouvernement royal de Hongrie a appris de ce rapport aussi qu'un de ses deux délégués a pris part, à la suite de l'échec des négociations avec le représentant du Royaume de Roumanie, à la préparation du rapport, élaboré également à Bruxelles par Messieurs les fonctionnaires du Secrétariat de la Société des Nations pour le rapporteur, Son Excellence M. Adatci, Ambassadeur du Japon, en vue de la continuation de la discussion de l'affaire devant le Conseil de la Société des Nations à sa prochaine session de juin. D'abord il y prit part exclusivement à titre privé et avec la réserve d'en vouloir référer à son Gouvernement. Mais à la fin, il se laissait entraînée, et dans des circonstances qui n'étaient point aptes à assurer la mûre réflexion qu'aurait exigée l'extrême sérieux de l'acte, il a parafé, au nom de son Gouvernement, une partie du texte d'un projet de résolution à soumettre dans l'affaire par le rapporteur à la décision du Conseil de la Société des Nations à sa prochaine session.

En présence de cette circonstance, le Gouvernement royal de Hongrie doit constater: 1° que le plein pouvoir donné à ses négociateurs ne les a autorisés qu'à la négociation directe avec la Roumanie; 2° que le Gouvernement royal de Hongrie n'était pas même en état de déléguer à ses négociateurs de pleins pouvoirs embrassant aussi le cas de la préparation du rapport du rapporteur, étant donné que le Gouvernement royal de Hongrie n'était point prévenu d'une telle éventualité; 3° que le Gouvernement royal de Hongrie est même d'avis que la préparation du rapport du rapporteur ne saurait pas rentrer dans les attributions

de ses négociateurs, par conséquent il n'aurait pas même pu leur donner de pleins pouvoirs à cet effet; 4° que les représentants du Gouvernement royal de Hongrie ont souligné eux-mêmes à plusieurs reprises au cours des pourparlers qu'il leur manquent tous pleins pouvoirs et toutes instructions quant à la préparation du rapport du rapporteur.

Il est donc évident que ledit délégué du Gouvernement royal hongrois a franchi les limites de ses pleins pouvoirs et que le Gouvernement royal de Hongrie, à son grand regret, ne peut pas, malgré l'apposition du parafe d'un de ses représentants sous une partie du texte, adhérer au projet de résolution.

Il le peut d'autant moins que le projet de résolution dont il s'agit, ne résout point le fond de la question, mais laisse le problème juridique ouvert, ainsi qu'il est constaté expressément dans le même projet de rapport.

Ce projet de résolution ne donne aucune solution à l'affaire, mais impartit seulement des conseils de caractère politique, qui restent en dehors du cadre du problème.

La Hongrie croit qu'il est son bon droit de s'attendre à une solution méritoire, même en base de l'article 11 du Pacte que vise la bonne entente entre les parties, car cette bonne entente ne peut être rétablie en laissant ouvert le problème, mais uniquement en tranchant le différend avec toutes garanties de justice et avec toutes les assurances qu'une solution judiciaire comporte.

Evidemment, c'était l'aiv aussi de la Conférence dse Ambassadeurs. C'est pourquoi elle a envoyé la Hongrie devant la Société des Nations comme le lieu compétent pour la solution du problème.

Il est impossible que la Société des Nations décline de trouver la voie d'une solution.

Le Gouvernement royal de Hongrie tâche de servir précisément la cause de la bonne entente, en recherchant la voie de la justice et la solution définitive du différend.

Mais en même temps, il tâche de servir et croit servir les intérêts et le prestige de la Société des Nations qui souffriraient gravement, il n'y a pas de doute, si la Société des Nations se montrait, dans un cas d'une si flagrante violation des traités, hors d'état: "de faire régner la justice" et de faire "respecter scrupuleusement toutes les obligations des Traités dans les rapports mutuels des peuples organisés," ainsi qu'il se trouve énoncé à l'entrée du Pacte même de la Société des Nations. Ce

défaut de solution serait d'autant plus grave qu'il s'agit en l'espèce d'un différend surgi à propos d'une question d'exécution des Traités entre deux Etats, dont chacun est membre de la Société des Nations et dont l'un s'était adressé à la Société des Nations en pleine confiance dans sa justesse et sa compétence.

Ayant soigneusement réfléchi à tout ce qui est dit en haut, le Gouvernement royal de Hongrie ose prier Son Excellence M. Adatci, rapporteur de l'affaire, de bien vouloir reprendre la voie qu'il a jugée la seule juste à la Séance du Conseil de la Société des Nations, tenue le 23 avril a. c., et de bien vouloir répéter à la prochaine session ses deux propositions si remarquables, présentées à ladite séance, à savoir: d'abord l'arbitrage de la Cour Permanente de justice, ensuite, dans le cas où la Roumanie résisterait encore à l'acceptation du compromis malgré l'invitation qui lui serait faite cette fois par décision du Conseil, l'avis consultatif de la Cour.

Le Gouvernement royal de Hongrie, convaincu de la justice de sa cause, et fort de ses droits, maintient ses points de vue exprimés dans la requête et dans les déclarations données par ses représentants au cours des deux séances du Conseil au mois d'avril, et espère pouvoir gagner l'adhésion à ses points de vue des Membres de Conseil lors de la prochaine session.

IV

Answer of Mr. Adatci (not dated), to the Hungarian Aide-Mémoire of June 12, 1923.

(Printed in full from the French text as it appears in "Recueil des Actes et Documents relatifs à l'affaire de l'expropriation par le Royaume de Roumanie des biens immobiliers des Optants Hongrois," published by the Hungarian Foreign Office, Budapest, 1924, pp. 65-66.)

Mr. Adatci a pris pleinement connaissance de la communication faite au nom du Gouvernement hongrois, en date du 12 juin 1923 (Budapest), au sujet de l'expropriation, par le Gouvernement roumain, des biens immobiliers appartenant aux optants hongrois.

Loin d'avoir échoué—ainsi que le laisserait entendre la communication hongroise—les pourparlers qui pendant de longues journées ont été conduits à Bruxelles, sous les auspices de M. Adatci, entre les distingués représentants des Gouvernements hongrois et roumain, ont donné certains résultats, qui peuvent contribuer à le solution des difficultés pendantes entre les deux pays; résultats constituant des points sur lesquels les représentants des deux Gouvernements se sont mis d'accord. Aussi n'est-ce pas sans surprise que M. Adatci a appris, par la communication du Gouvernement hongrois, que celui-ci semblerait vouloir mettre en cause ces résultats. Il est clair que l'activité du Conseil de la Société des Nations en vue de maintenir les bonnes rélations entre les Membres qu'un différend sépare, serait rendue impossible, si, contrairement à tout usage international, les délégués envoyés par les parties et dûment autorisés par elles pour négocier, sous les auspices d'un Membre du Conseil, pourraient ensuite être désavoués par leurs Gouvernements.

Aussi M. Adatci se félicite-t-il de pouvoir constater qu'en rêalité tel n'est pas le cas, et que le Gouvernement hongrois n'a point du tout l'intention de refuser de reconnaître les déclarations faites par ses envoyés spéciaux, au moins dans les strictes limites des pleins pouvoirs dont ils étaient pourvus.

Il peut suffire à M. Adatci de donner certaines explications concernant la procédure qui a été suivie.

Le Gouvernement hongrois dit qu'il ne peut pas approuver le projet de rapport au Conseil rédigé par M. Adatci, et le projet de résolution, parafé par les représentants des deux Gouvernements sous une partie du texte, le représentant hongrois n'ayant pas eu qualité pour y consentir. Le Gouvernement hongrois exprime même l'avis que la préparation du rapport du rapporteur ne saurait rentrer dans les attributions de ses négociateurs, ces derniers étant appelés aux négociations directes avec la Roumanie.

M. Adatci est également d'avis que la rédaction du rapport est la tâche du rapporteur et que celui-ci garde toute sa liberté pour présenter au Conseil les considérations et les conclusions qu'il estime juste. Si dans l'espèce, M. Adatci a montré son projet à MM les représentants des deux parties et demandé leur adhésion, c'est qu'il envisageait ainsi la possibilité de présenter un texte qui ne soulèverait plus de discussions à la réunion du Conseil.

Mais là n'est pas le point cardinal des pourparlers à Bruxelles. Le point cardinal n'a été qu'au cours des entretiens qui ont eu lieu directement entre eux; les représentants des deux parties, dûment autorisés à cet effet,—en présence des fonctionnaires du Secrétariat de la Société des Nations, que M. Adatci avait priés de se mettre à la disposition des délégués,—ont abouti de commun accord à certaines conclusions sur plusieurs points formant la base de la requête hongroise; requête qui est elle-même la base de l'examen de l'affaire par le Conseil. Ces points d'accord ont été récapitulés dans un compte-rendu qui a obtenu l'approbation formelle des représentants des deux parties.

Une copie du compte-rendu est en possession des deux parties. Il est inutile d'en résumer ici les différents points. Dans le rapport qu'il fera au Conseil, M. Adatci se propose de communiquer en premier lieu ces résultats positifs, qui ne sauraient être mis en cause.

En outre, ill proposera les résolutions qui lui paraîtront justes, et qui éventuellement pourront être mises au vote.

Le Gouvernement hongrois, à la fin de sa communication, prie M. Adatci de répéter à la prochaine réunion du Conseil les propositions *a*) de l'arbitrage devant la Cour permanente de Justice; *b*) le renvoi à la Cour pour avis consultatif.

Il est superflu à M. Adatci de rappeler au Gouvernement hongrois

que ces propositions ont déjà été faites par lui à la dernière réunion du Conseil, mais qu'à son grand regret, et malgré son insistance, elles n'ont pas pu obtenir l'adhésion du Gouvernement roumain. Dans ces conditions, il est inutile de les présenter à nouveau, puisqu'elles ne peuvent, certes, être agréés. Elles restent parmi les *retroacta* de l'affaire.

Dans ces conditions et à raison des résultats, auxquels ont abouti les entretiens des représentants des deux parties, sous les auspices du rapporteur, M. Adatci est d'avis que le Conseil doive désormais chercher d'autres moyens propres à assurer les relations de bon voisinage entre les deux pays. Il se réserve de présenter au Conseil ses conclusions, probablement dans le sens de celles contenues dans le projet de rapport qui est connu du Gouvernement hongrois; conclusions basées sur des preuves de bonne volonté et d'esprit de conciliation, de la part des deux parties.

M. Adatci adresse un chaleureux appel au Gouvernement hongrois pour qu'il ne laisse pas échapper cette occasion de contribuer à une solution amiable du différend.

V

Expropriation by the Roumanian Government of the Immovable Property of Hungarian Optants

Statement by M. Adatci submitted to the Council on July 5, 1923

(Printed in full, from the League of Nations Official Journal, Vol. 4, No. 8, pp. 1009-11.)

On April 23rd last, the Council instructed me to provide material for a further discussion on the question of Hungarian optants, and at the same time requested the two Governments concerned to use their best endeavors to arrive at an agreement. In pursuance of this Council resolution, I summoned the Hungarian and Roumanian representatives to meet a Brussels on May 26th; the results of this meeting are embodied in a report, which has been circulated to Members of the Council (Annex 533a). I ventured to include a draft recommendation to the two Governments; the report also contains as an annex the minutes of the principal conversations, which took place between the representatives of the two Parties on May 27th.

The wording of all these documents was carefully examined by the Hungarian and Roumanian representatives, who were quite free to make corrections and additions; it was fully accepted by them in the name of their respective Governments.

Since the receipt of this report by my colleagues, to my great surprise, new facts have come to light, and mention should be made of these before the opening of any further discussion on the question of Hungarian optants in Transylvania. These facts have been brought to the notice of the Members of the Council by official documents submitted by the Hungarian Government. In the first place, that Government, in a letter from the Hungarian Minister for Foreign Affairs, accompanied by a memorandum dated June 12th, has informed me that it considered that the negotiations opened at Brussels under my auspices *had failed,* and that, notwithstanding the placing of the signa-

ture of its representative under a portion of the text, it could not accept the draft resolution contained in my report. In the second place, it requested me again to submit to the Council the two proposals which had been considered during the preceding session. These proposals were for a settlement of the dispute by an arbitral award given by the Permanent Court of International Justice, or failing that, for a request from the Council to the Permanent Court to give an advisory opinion on the question.

I do not propose to discuss in the presence of my colleagues the legitimacy of this action by the Hungarian Government. If its representative at Brussels had full powers to conclude a direct agreement with the Roumanian representative, I would point out that I was endeavoring to secure such an agreement, and that my duty was merely to contribute to it by assisting both parties to realize what they might hope to obtain under the circumstances and the attitude adopted by each.

I have replied to this note from the Hungarian Minister for Foreign Affairs by a memorandum, the text of which has also been communicated to my colleagues. I confined myself to pointing out the true nature of the Brussels negotiations, and to recalling, in connection with the proposals which the Hungarian Government requested me to submit to the Council, that, at the last session, despite all my efforts, these proposals had had to be dropped, as the Council did not see its way to maintain them in face of the formal opposition of the Roumanian Government.

There exist in any case the minutes of a conversation between the Hungarian and Roumanian representatives held during the Brussels negotiations at which the officials of the Secretariat were present at their request. I have ascertained that the Hungarian Government acknowledged the declaration made by its special envoys—at all events, within the strict limits of the full powers with which they were furnished for the purpose of negotiating with the Roumanian representative.

The Roumanian representative stated on more than one occasion during the Brussels conversations that certain declarations, which he was prepared to make on behalf of his Government, could only be made if the result of the negotiations was of a nature to allow him to do so. In the opinion of his Government, it was for the Roumanian

representative himself to decide upon the situation created by the letter and the memorandum from the Hungarian Minister for Foreign Affairs.

More recently still, on the second of this month, the Secretary-General received from the Hungarian Government a document entitled "Supplementary statement submitted by the Royal Hungarian Government in support of its request concerning the expropriation by the Roumanian Government of the immovable property of Hungarian optants." The object of this document, which has already been brought to your notice, is to supply additional details on various points brought up at Brussels, which might be regarded as not having been fully enough explained in the appeal originally submitted by the Hungarian Government.

I do not consider it necessary to submit a complete analysis of this memorandum, the text of which is before you. A number of the arguments, which it contains and the facts to which it refers, are familiar to the members of the Council. I should merely call attention to those which appear to raise new points in the discussion.

It will be within your recollection that, as regards absenteeism entailing complete expropriation, the Hungarian appeal pointed out that there was an inconsistency between the obligation imposed upon optants to remove their domicile to Hungary and the obligation to be present in Transylvania under penalty of expropriation. In reply to this statement, it was shown that the date from which this period was reckoned, during which the optants were to leave Roumanian territory, was later than the date marking the end of the period mentioned in the clause of the agrarian law regarding absenteeism. This latter period, indeed, concluded on March 23rd, 1921, while the periods of grace allowed to optants for notifying the results of their option, and afterwards for removing their domicile to Hungary, did not begin to run until the date of the coming into force of the Treaty of Trianon, July 26th, 1921. The new Hungarian note lays stress on the fact that those optants, who moved into Hungarian territory at a time when their absence was bound to expose them to the penalties of the agrarian law, were, as a matter of fact, only complying in anticipation with the provisions of the Treaty, and that it is unjust to make them suffer for having observed prematurely the stipulations mentioned above.

Another argument, which so far had only been put forward verbally, is as follows: before the date of the entry into force of the Treaty of Trianon, Transylvania was still, from the point of view of international law, Hungarian territory. The Transylvanian land-owners, who were absent from their estates between December 1st, 1918, and March 23rd, 1921, cannot accordingly be thereby prejudiced by the provisions of Roumanian law, seeing that this law, according to the Hungarian Government, was not applicable within a territory, which, during the period referred to, was outside the jurisdiction of Roumania.

A part of the new Hungarian note deals with the general tendency of the agrarian law in Transylvania. One of the annexed documents shows that in this province the great majority of the estates were held by Magyars. Another shows the division of the land into large, average-sized and small estates with the object of proving that the agrarian law in Transylvania was not dictated by economic necessity. Another gives the provisions of the agrarian law applicable in Transylvania side by side with the provisions applicable within the limits of the old Kingdom of Roumania. Special mention is made on page 14 of the estates held collectively by the former regiment of Czekler frontier guards, which were confiscated as being Hungarian state property, while the estates held collectively by the former Roumanian regiment of frontier guards was not similarly dealt with.

When the Hungarian representatives, during the Brussels conversations, spoke of the impossibility of absentee land-owners recovering their lands, since they could not, under the régime in force during the military occupation, cross the demarcation line, M. Titulesco, the Roumanian representative, replied that he must be referring to special cases, and that it was necessary to give particulars. Annexes 11 and 12 to the last Hungarian note give the photograph of the Roumanian text, and a translation in French, of a certificate, issued on May 28th, 1923, by the Roumanian Legation at Vienna to Count Rafael de Zichy, stating that since the break up of the Austro-Hungarian Monarchy down to February 16th, 1921, the granting of passport visas for Hungarian subjects had been forbidden, and that Count de Zichy, who, on several occasions between May and August, 1920, applied to the Royal Roumanian Commissioner to obtain a permit to enter the Kingdom, had invariably been refused.

My object in going into these details is to call attention very briefly to events, which have occurred since the Brussels negotiations —negotiations which were regarded as being completely successful even by the representatives of the two contending Governmnts—and to explain as clearly as possible the circumstances under which our discussions are now being reopened.

As the situation has unfortunately changed since I drew up my report and the draft resolution which it contains, the members of the Council will doubtless, as a first step, request the Hungarian representative to set out fully the precise reasons which prevent his Government from accepting the draft resolution in my report drawn up at Brussels, a resolution to which the Hungarian representative at Brussels, after mature deliberation and with full consciousness of the importance of the step he was taking, signed on behalf of his Government. The Hungarian representative will also be able to give any verbal information, which may be required regarding the document submitted by him to the Council on the 2nd inst. After Count Apponyi had made his statement, the Council will doubtless desire to ask the Roumanian representative whether he has any observations to make on this question. Finally, the Council may discuss what action, if any, should be taken in the matter.

It has been my object to draw the attention of my colleagues to all the fresh facts which have occurred since the Brussels conversations, but I should like them still to regard my report, and the draft resolution which forms the conclusion of that report, as the basis of their present discussions.

VI A

Roumano-Hungarian Mixed Arbitral Tribunal

In the matter of: Emeric Kulin, Senior,
vs. the Roumanian State Nr. R. H. 139.

[*Translation.*]

The Roumano-Hungarian Mixed Arbitral Tribunal regularly composed of Mr. De Cedercrantz, President, Mr. Székács and Mr. Antoniade, Arbitrators, assisted by Mr. Zarb, Secretary, sitting with all members present at 57, rue de Varenne, in Paris, and deliberating with closed doors;

Considering the request lodged on the 29th of December, 1923, by M. Emeric Kulin Senior, of 28 rue Komlóssy, Debreczen, Hungary, which request asks that it may please the Tribunal:

1. To state and declare that the measures in restriction of the right of ownership applied to the landed property and chattels of the Claimant by the Roumanian Government are contrary to the stipulations of Art. 250 of the Treaty of Trianon;

2. To condemn the Roumanian Government to return to the Claimant his personal and real property free from all incumbrances and in the same condition in which the same was before the measures in question were carried out; and to reinstate the said landed property in its previous status in the land registers;

3. To condemn the Roumanian Government to pay to the Claimant an indemnity fully representing the damage suffered in consequence of the deteriorations occasioned to the said personal and real property by the deprivation of possession, and to refund all expenses and disbursements incurred in consequence of the application of the measures complained of by the Claimant;

4. Alternatively to condemn the Roumanian Government to pay to the Claimant the replacement value of all or part of the real prop-

erty in question and of all or part of its appurtenances in the event of it being proved that it is impossible for the Roumanian Government to return the same;

5. To compute the amount of the indemnities referred to above ex aequo et bono;

6. To condemn the Respondent to pay all the costs and expenses;

7. To invite the Roumanian Government to suspend the execution of all measures in restriction of the right of ownership likely to affect the property in question;

Considering the demurrer registered on the 16th of June, 1925, by which the Respondent alleges incompetence of the Tribunal;

Considering the reply to the demurrer entered on the 26th of September, 1925;

Considering the rejoinder filed on the 4th of January, 1926;

Considering the counter-rejoinder entered on the 15th of April, 1926;

Considering the amending vote of the Roumanian Government entered on the 27th of November, 1926;

Considering the documents relating to the case;

Considering the minutes of the sittings held in Paris on the 15th, 16th, 17th, 20th, 21st, 22nl and 23rd of December, 1926;

Having heard at the said sittings Maître Millerand, barrister at the Court of Appeal of Paris, Professor Politis, and Maître Rosenthal, barrister at Bucarest, for the Roumanian Government;

Having heard Professors Gidel and Brunet, barristers at the Court of Appeal of Paris, for the Claimant;

Having heard Mr. Popesco-Pion and Mr. Gajzágó, Agents General respectively of the Roumanian and Hungarian Governments;

Whereas in his demurrer the Respondent submits that the measures complained of by the Claimant were taken under the Agrarian Law in Transylvania and are measures of expropriation by way of agrarian reform which apply to all landowners irrespective of their being nationals or aliens; that, moreover, an expropriation indemnity is paid to all expropriated parties; that the measures in this case are not measures of seizure or liquidation within the meaning of Art. 250 of the Treaty of Trianon and that, consequently, they are not within the competence of the Tribunal;

Whereas the Respondent began by submitting also that, in order

that a claim under Art. 250 may be introduced before the Tribunal, it is necessary that the measure complained of should have been taken between the 3rd of November, 1918, and the date on which the Treaty came into force, viz. the 26th of July, 1921;

Whereas this defence, which was developed by the Respondent in the written proceedings, was dropped in the course of the oral argument, which fact should be borne in mind;

Whereas it is proper first to point out that in inserting Art. 250 in the Treaty of Trianon, the Allied and Associated Powers intended to place the property, rights and interests of Hungarian nationals situated within territories of the former Austro-Hungarian Monarchy entirely outside the effect of all the measures mentioned in Art. 232 and in the Annex to Section IV as well as in Art. 250 itself, and to place such property, rights and interests under the government of common international law;

Whereas this clearly results from the preparatory work relating to Art. 267 of the Treaty of St. Germain and Art. 250 of the Treaty of Trianon, as well as from the very text of this latter article;

And therefore the Tribunal should refer to the principles of common international law whenever it is called upon to decide on a claim under Art. 250;

Whereas pursuant to Art. 250 those claims are to be submitted to the Mixed Arbitral Tribunal which are introduced by Hungarian nationals, whether so by option or otherwise, in respect of property, rights and interests situated on territories of the former Austro-Hungarian Monarchy, where such property, rights and interests have been subjected to any of the measures mentioned in the said Article;

Whereas it is precisely on this latter point that the defence put forward in the case turns, the Respondent maintaining, as previously stated, that the measures were not measures of seizure and liquidation within the meaning of Art. 250;

Whereas what is material in arriving at a just appreciation of the question of the competence of the Tribunal is therefore to ascertain whether the measures complained of herein present or not the characteristic features of one or other of the measures which, under Art. 250, may give rise to claims that can be submitted to the Mixed Arbitral Tribunal; and whereas if the Tribunal finds that such is the case there are already sufficient facts to establish its competence, but it

is only by examining the merits of the claim that it will be in a position to ascertain whether really the circumstances of the case are such as to come within the application of Art. 250;

Whereas the fact put forward by the Respondent that the measures in question had been taken in execution of the law on agrarian reform in Transylvania, Banat, Crishana and Maramures, has no bearing on the question of competence; and whereas it is only in the event of the Tribunal retaining jurisdiction in the matter that the Respondent will be able, in presenting its defence against the merits, to make use of the pleas drawn from the legislation on agrarian reform as well as of any other plea as to the merits, of which it may care to avail itself in order to show that Art. 250 must be inoperative in this case;

Whereas, with regard to the measures complained of by the Claimant, his allegations in this respect have not been contested by the opposing party, and it is therefore established that the Claimant was the owner of one half of a rural estate, owned jointly with his son, situate at Érendréd, in the Comitat of Szatmár, having a total area of one half of about 312 cadastral jugars, the said property being well equipped and including numerous head of cattle; and the Claimant's share was at first subjected to formal seizure and subsequently was taken from him under the agrarian law; and the Roumanian Government was registered in his place as owner in the land registers; and a small indemnity was promised to him, but has not been paid yet; and his cattle, implements and agricultural products were taken away;

Whereas in order to appreciate the import of this measure it is not necessary to examine whether the indemnity promised to the Claimant was or was not to be considered as an adequate indemnity, which, moreover, is essentially a question of merits; whereas indeed the other facts brought forward by the Claimant are sufficient to show that the measure concerned in the case is one which affects the property of an ex-enemy by removing it in its entirety from the owner and without his consent; and this measure constitutes a violation of the general principle of the respect of acquired rights and oversteps the limits of common international law and fully presents the character of a liquidation within the meaning of Art. 250 and is by its very nature to be classed among the measures referred to in the said Article;

Whereas the Respondent holds that the measure referred to in Art. 250 under the name of "liquidation" is a war measure taken

for war purposes, the most characteristic feature thereof being that it affects ex-enemy property "as such," whereas the expropriations arising under the agrarian reform, from their very nature are not liquidations, since they are not in any respect differential measures and, at any rate, are not measures taken for any war purpose, and therefore are not in any way incompatible with Art. 250;

Whereas it results clearly from the terms of Articles 232 and 250, as well as from paragr. 3 of the Annex to Section IV that the liquidation within the meaning of Art. 250 may be either a war liquidation or a post-war liquidation, and the meaning of either of such liquidations is the same and it is only by their object that they are differentiated; and whereas either case involves subjecting ex-enemy property, rights or interests to a treatment which constitutes a derogation from the rules generally applied as regards the treatment of aliens and the principle of respect of acquired rights;

Whereas the question as to whether the expropriations in question in this case are or are not differential measures concerns essentially the merits of the case, and consequently it is not necessary to examine it at present;

Whereas in these conditions there is no doubt that the Tribunal is competent to deal with claims arising from this measure and submitted by a Hungarian national; and it is by an examination of the merits of the case that it can be ascertained whether, in applying this measure, the Respondent had or had not sufficient ground to authorize them to depart from common international law;

Whereas at the time of the oral argument the Respondent brought forward a new defence by maintaining that the compatibility of the expropriations with the Treaty of Trianon had been recognized by the representative of the Hungarian Government in the course of certain conversations which took place at Brussels on the 27th of May, 1923, between representatives of the two Governments, as well as by the Council of the League of Nations in its resolution of July 5, 1923;

Whereas it appears from the official texts published in the Journal of the League of Nations that, by a request dated the 15th of March, 1923, the Hungarian Government, referring to the second paragraph of Art. 11 of the Covenant of the League of Nations, drew the attention of the Council of the League to the expropriation which was being carried out by the Roumanian Government on the real property of

owners who had opted for the Hungarian nationality subsequently to the transfer of Hungarian territories to the Kingdom of Roumania, and that it formulated certain demands in this connection; that after the Council had dealt with the question at the meetings of the 20th and 23rd of April, 1923, the said question had been the subject of negotiations at Brussels between representatives of the two Governments in the following month of May, and that at their meeting of July 5, 1923, the Council, after examining their Rapporteur's report concerning the conversations held at Brussels as well as the documents annexed thereto, among which was an account of the said conversations, approved the report and placed on record the various declarations contained in the said account;

Whereas the thesis of the Respondent is based on the following passage of said account:

"As to the question of incompatibility between the Roumanian law and the provisions of the Treaty relating to the rights of persons having opted for Hungarian nationality, it is admitted, and the Hungarian representatives do not contest this, that the Treaty does not oppose any expropriation of the property of such persons for reasons of public utility including the social necessities of an agrarian reform";

Whereas the said account, which relates to conversations held at Brussels between representatives of the two Governments, exactly specifies in every case by whom the declarations therein contained were made, either in textually reproducing such declarations or in merely giving the sense thereof; and whereas the passage referred to by the Respondent does not contain any indication of this nature, and for this reason alone it is at any rate doubtful whether the passage is really a formal declaration by the Hungarian representatives; and whereas on the other hand the account states a little further on that on examining the question of indemnity "the Hungarian delegate is of opinion that a so-called deferred gold payment cannot be taken into consideration. In matters of expropriation payment in cash alone is justified," which gives ground for assuming that in no case did the Hungarian delegates understand by the word "expropriation" as occurring in the passage quoted above the taking away without an adequate indemnity of the property of persons having opted for Hungarian nationality; and whereas it results from the foregoing that the acknowledgment of the compatibility of the expropriations with the Treaty necessarily pre-

supposes therefore, in the Hungarian representatives' opinion, compliance with all the ordinary rules of expropriation, one of which is the immediate payment of an adequate indemnity; and whereas the above considerations knock the bottom from this part of the Respondent's argument;

Whereas, moreover—assuming hypothetically that the passage quoted is a real acknowledgment—it should be borne in mind that the fact occurred in the course of negotiations between representatives of the two Governments with the object of arriving at an understanding concerning the matter forming the subject of the request dated the 15th of March, 1923, and for this purpose the conversation dealt with five different points which formed together the very subject of the dispute between the two Governments, and the passage quoted above refers to the first of these points; that if a conciliatory declaration was made at the beginning of the negotiations by the Hungarian representatives, it must of necessity be interpreted only as the expression of a desire to arrive at an understanding, or as a concession made in the hope of obtaining concessions from the opposing party on other points, with a view to arriving ultimately, through mutual concessions, at an agreement on all the five points and thus on the whole matter in dispute; that in any case a concession made under such circumstances could not be alleged against the party making same except where it formed an integral part of an agreement concluded subsequently and bearing on the whole matter in dispute, which has not occurred; that in fact the account states, as regards point No. 3—fixation and nature of the indemnification—, that after an exhaustive conversation and declarations by both sides, "both representatives deemed it inadvisable to prolong the discussion on the question of purchase price, no agreement between their respective theses appearing possible"; that if at Brussels agreement was reached on other litigious points—a question the Tribunal has no reason to concern itself with—in any case it is acknowledged that on one point at least, which is of capital importance, the account had to record that there was absolute divergence between the representatives; that it is not admissible in law to detach, as is done by the Respondent, from the text of the account, an isolated declaration and, without consideration of the circumstances in which it was made, to put it forward as an official acknowledgment from the Hungarian Government, capable of binding all Hungarian nationals and depriv-

ing them consequently of the right which is absolutely guaranteed to them by Art. 250 and which enables them to submit to this Tribunal any claim arising under the said article; that in these circumstances, even if the declaration in question was really an acknowledgment made by the representatives of the Hungarian Government, it must be admitted that it is of no value as regards the settlement of the present dispute;

Whereas the Respondent submits also that the Claimant voluntarily presented himself before the Roumanian court without pleading an objection under Art. 250, that he submitted his defence as to the facts and thus recognized that the measures now complained of constituted acts of expropriation; that having thus acknowledged before the Roumanian courts that the agrarian laws constituted an expropriation, the Claimant cannot pretend to-day before an international Tribunal that the same laws constituted liquidations within the meaning of Art. 250;

Whereas the Respondent cannot invoke any principle of law in support of these allegations, which, in fact, are contrary to the opinion universally held, namely, that in matters of international jurisdiction nothing prevents an interested party from first exhausting the means of redress offered by the national law before appealing to the international forum; and whereas the fact that before the Roumanian courts he only claimed under the internal law he cannot deprive him of the right to claim before this Tribunal under the provisions of an international treaty;

Whereas, as already stated, the question of indemnity is essentially a question of the merits, and consequently the Tribunal is not prepared to take into consideration, at the present stage of the case, the observations submitted by the Respondent in this respect;

Whereas it is incorrect for the Respondent to invoke in support of its contention a letter dated the 13th of August, 1919, and addressed to the President of the Czecho-Slovakian Delegation, alleging that it emanated from the Peace Conference whereas this letter is in fact signed by the President of the Commission of the New States and Protection of Minorities and has nothing to do with the preparatory work in connection with the Treaty of Trianon, but refers only to the wording of some articles of the Treaty on the protection of minorities, and is no conclusive proof in this case;

ON THESE GROUNDS

I. Declares itself competent.

II. Requests the Respondent to submit its reply on the merits within a period of two months from the date of notification of this judgement.

III. Reserves the costs.

Paris, the 10th of January, 1927.

Signed: Cedercrantz

Signed: Székács

On behalf of the Roumanian Arbitrator:
Signed: Cedercrantz

VI B

Dissenting Opinion of the Roumanian Arbitrator in Cases before the Roumanian-Hungarian Mixed Arbitral Tribunal on the Demurrer to the Jurisdiction

[*Translation*]

The undersigned Roumanian Arbitrator dissents from the opinion of the majority of the Tribunal concerning the competence of the latter in the case of Docket No. 139 a question concerning which the Roumanian Government, guided by deference for international justice, gave explanations to the Tribunal, declaring nevertheless that it will not lay down conclusions as to the merits and that it reserves full liberty of action with respect to the future (see among others the pleadings of M. Millerand).

Subject to the preceding reservation, the undersigned Roumanian arbitrator sets forth the following:

Whereas, by the original petition, the claimant asked the Tribunal to state and declare that the measure of expropriation applied to his landed property situated in Transylvania, by virtue of the Rumanian agrarian law is contrary to the stipulations of Art. 250 of the Treaty of Trianon; to order the Roumanian State to return to him his property free from all incumbrances and to pay to him all damages suffered in consequence of the expropriation: alternatively, in the event of it being proved that restitution in kind is impossible, to pay him a complete indemnity, the amount of which should be computed *ex aequo et bono* with cost and expenses;

Whereas, before any answer was made as to the merits the Roumanian government filed a demurrer, seeking to have the Tribunal declare its incompetence in view of the fact that the measures applied to the property of the applicant do not come within the provisions of Art. 250, which alone determines the competence of the Tribunal in the

case in issue, these measures being measures of expropriation by way of agrarian reform for the purpose of national welfare which cannot be compared to a measure of seizure or liquidation within the meaning of that article;

Whereas, the rule of competence of the Tribunal is set out in Art. 250 in the following terms: "Claims made by Hungarian nationals under this article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239," the whole dispute is reduced to this—whether the measure of which the claimant complains is a measure of seizure or liquidation within the meaning of that article;

Whereas, before arriving at the examination of this question, it is important to note that Mixed Arbitral Tribunals, whenever they have to determine their own competence always show the greatest discretion, and that exceptional international forums with limited jurisdiction always refuse broad interpretations in order not to deprive the defendants of their proper judges;

Whereas, this cautious attitude is the more required when the question is, as in the present instance, of a jurisdiction exceptional in several respects, first, due to the exceptional nature of this Tribunal; in the next place, due to the exceptional terms of Art. 250 which derogates from the general rule of the Treaties in matters of the seizure and liquidation of ex-enemy property in favor of one single category of Allied countries, namely, the succession states; finally, due to the character of the defendant, which as a Sovereign State cannot be brought before an exceptional forum, no matter of what dignity, for acts done in the free exercise of its sovereignty, without its formal consent;

Whereas, Art. 250 containing a derogation from a principle previously incorporated in the same Treaty (which is common in all the treaties concluded at the end of the Great War) and stipulating that "notwithstanding the provisions of article 232 and the Annex to section 4, the property, rights and interests of Hungarian nationals or companies controlled by them, situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation, in accordance with these provisions," it is necessary to refer to the general rule of which this new stipulation is a derogation in order to appreciate the sense and the purport of this limitation, to see what is permitted by virtue of the general rule to which the new provision is an exception;

Whereas, the derogation contained in Art. 250 in favor of Hungarian nationals relates to the provisions of Art. 232, paragraph (*b*) which gives the Allied and Associated Powers the right to retain and liquidate all property, rights and interests of nationals of the former Kingdom of Hungary or companies controlled by them and situated in the territories of these Powers, in their colonies, etc. . . . ;

Whereas, that which is permitted by this provision which—it must be admitted—constitutes an important derogation from common international law and a privilege in favor of the Allied and Associated Powers which has been characterized as excessive, and is an exceptional measure, the nature and purpose of which has to be determined as it proceeds from the text and spirit of the Treaty;

Whereas, the right to retain and to liquidate accorded to the Allied Powers has a purpose strictly defined and regulated in its effects, by various provisions contained especially in Section IV part X of the Treaty (cf. Art. 232, *h, j:* sec. 4, 9, 15 of the Annex, and Art. 174 of part VIII) ; that this purpose is the reparation for damages suffered by the Allied Powers and their nationals in the War, for which Hungary declared herself responsible (art. 161) ;

Whereas, aside from the characteristics inferred from their purpose, the measures permitting retention and liquidation have another distinguishing trait which results from their very nature, namely, that they are in substance discriminatory measures, to wit, that they affect certain properties, rights and interests in so far as they belong to ex-enemies and only because of the nationality of their owners; that this distinguishing character has been recognized by the Permanent Court of International Justice which in its seventh judgment declares (p. 32) "that it is indisputable that the liquidational régime established by the Treaty of Versailles (as well as by the other Treaties) *applies to German property as such";*

Whereas, the Claimant in the written proceedings as well as during the oral argument contested the discriminatory character of the measures of seizure and liquidation and to support his contention invoked the decisions of the Mixed Arbitral Tribunal which in case of exceptional measures of war and dispositions taken by the ex-enemy governments on their territory against the property rights and interests of nationals of the Allied and Associated Powers does not require the discriminatory character of such measures in order to pass upon damages

suffered by such nationals, an event foreseen especially by paragraph (*e*) of Art. 232 (corresponding to 297 of the Treaty of Versailles) which decisions they wish to expand by analogy, to the cases of liquidation defined by Art. 232, section (*b*), and 250;

Whereas, Art. 232 of the Treaty of Trianon (297 of the Treaty of Versailles) contains two different types of ideas: on the one hand, the measures taken by the ex-enemy governments in time of war against the property, rights and interests of Allied and Associated nationals (paragraphs *a, e, f, g*) : on the other hand, the measures taken during or after the war by the Allied and Associated governments against the property, rights and interests of ex-enemies in their territories and for the purpose of reparation (paragraphs *b, c, d, h, i, j*) ; that the decisions cited have only established that in so far as concerns the first hypothesis where the Tribunals, finding themselves faced with the necessity of indemnifying an Allied national, associated, in spite of himself, by war measures, in the war against his country, could only logically consider as essential the belligerent character of the injurious act, its discriminatory nature is not essential to give it the character of a war measure; that it is an established fact that all these decisions do not dispense with the necessity of seeking a discriminatory character except when we are faced with a measure characterized as a war measure;

Whereas, if the Tribunals have not yet had the opportunity to rule as to the other hypothesis, where the question is not a question of reparation for war measures, it is nevertheless true that it follows from the spirit and likewise from the terms of their decisions that if they had had the opportunity to rule as to the second hypothesis they would have required a discriminatory trait, above all when it was a matter of measures of liquidation taken after the war (cf. the type of decision, which consequently all others have followed; Belgo-German M.A.T.: Rymenans et Co. v. Germany, Recueil, I, p. 878 and especially the considerations 1 and 2, page 885, consideration 3, page 887, consideration 4, page 888, and consideration 1, page 891) ; that, therefore, the objection casually confusing two different ideas should be discarded and the discriminatory character of the measure of liquidation should be maintained;

Whereas, such being the characteristic traits of the measure permitted by Art. 232*b*, the same traits should be found again when it is a question of a measure prohibited by Art. 250;

Whereas, the measure of expropriation of which Applicant complains can in no way be compared with liquidation, this measure being irrelevant to all notion of reparation for war damages, and independent of all discriminatory treatment; that it follows from the history of the agrarian reform in Roumania as well as from the different laws for the different provinces of the Kingdom—and in this particular case which at present engages our attention, from the agrarian reform law applicable to Transylvania, etc. . . .—that the question turns around a great social and economic reform aiming at the creation of a class of peasant proprietors, a reform the principle of which was decreed by the Roumanian government before the war and has been incorporated in the Constitution of the Kingdom by the fundamental law of July 20, 1917—hence, a measure of public order, dictated by the needs of a sovereign State, the only judge of its vital interests, and applicable to all land owners without a single distinction as to nationality—to Roumanian nationals as well as to all foreigners, neutrals, allies, or exenemies, under the same legal conditions, in the matter of the portion to be expropriated, the indemnity to be paid, and the method of payment;

Whereas, under these conditions one cannot say, as has been affirmed in the written proceedings, that the agrarian reform in Transylvania will simply be an indirect means to strike only the Hungarian proprietors and to arrive by the use of false means at a veritable liquidation of their immovable property; that the problem would be, then, to put in question the good faith of a State which, following all the principles and conforming to the decisions of the Permanent Court of International Justice (judgment No. 7, p. 30) should always be presumed, and concerning which it is incumbent upon him who contests to furnish proof of his allegation;

Whereas, in view of these considerations the expropriation for a social purpose cannot be compared to the juristic institution of liquidation; the measures taken by the Roumanian government are not incompatible with Art. 250 of the Treaty and the Tribunal might, without further reason, decline jurisdiction;

Whereas, moreover, the compatibility of these agrarian expropriations in Roumania with the Treaty of Trianon has been formally recognized by the Hungarian government in an agreement at Brussels, on May 27, 1923, between her plenipotentiaries and the plenipotentiary

of the Roumanian government, an agreement of which the Council of the League of Nations has taken note by its resolution of July 5, 1923, in Geneva;

Whereas, so far as this agreement is concerned, it results from the official documents published in the Journal of the League of Nations, that by a request of March 15, 1923, the Hungarian Government, under the terms of Art. 11 of the Covenant, called the attention of the Council of the League of Nations to the expropriation in Transylvania by the Roumanian government of immovable property belonging to her subjects who had opted for Hungarian nationality, and demanded that said Council rule that the legislative and administrative provisions of the Roumanian government are contrary to the Treaties, and to order that the immovable property of the Hungarian optants be restored to them with complete indemnity for damages suffered; that following that request the Council, after having heard the representatives of the two governments in their meetings of April 20 and 23, 1923, decided to postpone the examination of the case until its July meeting and invited the parties to make every effort with a view to arriving, in the meantime, at an amicable arrangement; that in the interim, the reporter of the case, Ambassador Adatci, having invited the representatives of the two governments to undertake under his auspices negotiations aiming at an agreement, these representatives went to Brussels where their negotiations resulted on May 27, 1923, in the draft of a *procès verbal* which deals with five points which constituted the subject of dispute between the two governments and which recorded the statements of the parties concerning each of these points; that concerning the first point which bears on the question of the incompatability between the Roumanian agrarian law and the provision of the Treaty of Trianon with respect to the rights of Hungarian optants, *"it has been admitted and the Hungarian representatives do not contest that the Treaty does not exclude an expropriation of the property of optants for public purposes including therein the social necessities of an agrarian reform";* that as a result of this act of Brussels and in spite of the disavowal of its plenipotentiaries by the Hungarian government, a disavowal of which the Council of the League did not feel that they ought to take account, the reporter believing that *"the two parties have in common accord reached certain conclusions upon several points constituting the basis of the Hungarian request, and that* it ought not to be admitted that the

positive results achieved should be placed in question" proposed to the Council to take action upon the declarations contained in the act of Brussels; that the Council in its session of July 5, 1923, after having heard the representatives of the two governments, the reporter, as well as the declarations of several of its members, who all believed in the existence of the agreement of Brussels which settled the litigation pending between the two governments, approved the report of Ambassador Adatci, and took account of the various declarations contained in the minutes annexed to the report adding "that it hoped that the two governments will do everything possible in order that the question of the Hungarian optants may not become a cause of disturbance in the good neighborly relations between the two countries";

Whereas, this accord in so far as it recognized the compatibility of the Roumanian agrarian law with the Treaty of Trianon has the character of an official interpretation which the two interested governments have given to the provisions of this Treaty in so far as concerns the immovable property of Hungarian nationals in the ceded territory by admitting that the protection of such property does not exclude an agrarian reform dictated by social necessities;

Whereas, it is incontestable that the states which signed a treaty are qualified and able to interpret it and to determine the sense and purport which their plenipotentiaries gave to its clauses; that this interpretation has an official character and shares the obligatory force of the act with which it is incorporated; that hence it binds not only the governments which gave and which cannot withdraw their interpretation, but also their nationals who cannot give any other interpretation than that given by their governments;

Whereas, for the validity of such an interpretation there is no need, as was maintained during the oral argument, for a solemn form or for a subsequent ratification according to the general rule, both doctrine and diplomatic practice recognizing that it suffices if an interpretation adopted be drafted in a protocol terminating a conference or established by a concurrent exchange of notes or that it be consigned to the form of reciprocal declarations (cf. Fauchille, *Traité de Droit International Public*, I, 373 *et seq.* and the examples there cited);

Whereas, the Claimant, defendant on the demurrer, contests in the first place that there was any accord whatever at Brussels and asserts that the document of May 27, 1923, merely established disagreements;

that in any case if there is a declaration on the part of the Hungarian plenipotentiaries concerning the compatibility of the Roumanian agrarian reform with the Treaty, in making such declaration the latter understood only an expropriation with adequate indemnity according to the rules of international law; that finally, the declarations of Brussels constitute an indivisible whole from which one cannot detach an isolated declaration and use it; that this isolated declaration which was only made with a view to obtaining concessions on other points in dispute loses all its importance from the moment when the principal point of dispute, the amount of the indemnity to be accorded the expropriated owners, did not result in an agreement;

Whereas to the first objection—the non-existence of the agreement—the documents make sufficient answer; that if there could not have been an agreement it is not comprehended why the Hungarian government felt the need of disavowing its plenipotentiary, a disavowal which the Council did not consider it necessary to take into account; that in any case it cannot be conceived that an international organism having the importance and prestige of the Council of the League of Nations would take into consideration, discuss at length, and finally ratify a non-existent thing;

Whereas, so far as concerns the second objection, it is established that during the Brussels debates they were not discussing an abstract agrarian reform and fixing the general principles of international law, but in fact the Roumanian agrarian reform of which all parts were known to the two parties—a reform which was the basis, with all its concrete conditions, of the petition of the Hungarian government to the Council of the League;

Whereas, so far as concerns the last objection—the indivisibility of the agreement of Brussels—this argument loses all value in view of the fact that the plenipotentiaries having agreed to discuss in their logical order all the reasons advanced in the Hungarian petition gave first place to the question of principle dominating the entire debate, namely, the compatibility or incompatibility of the agrarian law with the Treaty, which was the only question of an international character which divided the parties, the other questions to be discussed, namely absenteeism, the mode of payment of the indemnity and its amount, the provisions of Art. 18 of the Roumanian Constitution, various other provisions of detail of the agrarian law, being merely questions of internal

Roumanian legislation; that if hence an accord was reached on the primary question and if it was recognized that the Roumanian government had not infringed the Treaty of Trianon—which happened—the question in its entirety lost its international character and became an internal question reserved to the sovereignty of Roumania so long as it cannot be asserted that the central point of the dispute was any other; that that was recognized by the Council of the League which was content to take note of the fact and to make the following recommendation to the parties:

"It, (the Council) is convinced that the Hungarian government after the efforts made on various occasions to remove any misunderstanding on the question of the optants will use its best endeavors to reassure its nationals and that the Roumanian government on its part, loyal to the Treaties and to the principles of justice upon which it declares its agrarian legislation is founded, will give proof of its good will with respect to the Hungarian optants";

Whereas, in view of this accord on the compatibility of the agrarian expropriations with the Treaty of Trianon the question of the jurisdiction of this Tribunal is definitely decided in the sense of a radical incompetence and hence any further examination becomes superfluous;

Whereas, beyond the admissions of the Hungarian government the Hungarian claimants themselves recognize explicitly that the measure which affected them had the legal character of an expropriation and not that of a liquidation forbidden by Art. 250, and that on the occasion of their proceeding before the Roumanian courts competent in matters of expropriation, a remedy which they all exhausted in presenting their detailed defence on the merits without pleading Art. 250 and without making the least reservation on the nature of that measure; that hence these claimants having recognized in the matter of property and on the basis of a judicial contract freely entered into resulting in a judicial decision having the authority of *res judicata,* that the agrarian laws which were applied to them constituted an expropriation and not a liquidation, cannot now claim before an international forum that the same agrarian laws constitute a liquidation in the sense of Art. 250;

Whereas, one cannot invoke in order to annul these decisions having the authority of *res judicata,* the rule of international law according

to which it is imperative to exhaust national remedies before having recourse to international remedies, in view of the fact that the rule presupposes that it is the same subject which is brought before the international tribunal; that in the present case at issue the applicants, finding themselves opposed in virtue of a judicial contract freely entered, by decisions having the authority of *res judicata* with respect to the nature of the measures taken, seek to begin a new suit having a new cause, namely, a "liquidation," before the international tribunal;

Whereas, in answering these juridical arguments the Hungarian applicants in order to invoke at any price the competence of the tribunal, assert that by the fact of returning to common international law brought about by the insertion of Art. 250 in so far as it is an exception to the provisions of Art. 232 *b,* the property of Hungarian nationals situated in the ceded territories has acquired a special status which shelters it perpetually from any injury whatsoever, and that consequently, and always according to Art. 250, the Mixed Arbitral Tribunal will be competent whenever there is a question of such an injury; that therefore the measures of seizure and liquidation prohibited by Art. 250 are all those which in any way whatsoever violate the rules of common international law and in order to establish the competence of the Tribunal it will be sufficient that a measure applying to Hungarian property should have only the appearance or should offer the theoretic possibility of violating any rule whatever of common international law;

Whereas, it is important to examine this double thesis from the point of view of positive provisions of the Treaty and the principles of international law;

Whereas, if it is true that Art. 250 annulling the prerogative of Art. 232 *b* returns, so far as it concerns Hungarian property in the ceded territories, to common international law, it does not necessarily follow from this return that a privileged status has been created for this property, but simply this much, that this property will have the protection accorded to all alien property;

Whereas, the doctrine of international law as well as of customary law which governs the relation of State to State in this field admits that aliens have a right to protection of their persons and their property to the extent to which the laws secure such protection to nationals; that this equality of treatment implies that the landed property of an alien is subject to the laws which regulate the landed property in the country

where it is situated; that although there has been lately a tendency among certain writers to request for the property of aliens a greater protection than that which is accorded to nationals, this tendency has not been followed by the majority of the doctrine nor has it become the customary law (cf. Fauchille, I, 930-944; de Louter, *Le droit international positif,* I, 206; Lectures of Professor Borchard in Bibl. Visseriana, III, 19 ff.);

Whereas, the Hungarian property, like all foreign property, being governed, under the domain of general international law, by the principle of equality of treatment with the property of nationals, the expropriation for a public purpose of the state (public or national), a vital and necessary institution for the state, cannot be excluded in principle and may be applied to foreigners as to nationals;

Whereas, moreover, the propriety of expropriation for public purposes, according to general international law, is recognized formally by the Permanent Court of International Justice in its Judgment, No. 7 (page 22);

Whereas, the principle of national treatment being the rule generally admitted in international law is the principle which was inscribed in the Treaty of Trianon (as moreover in all the Treaties) when it concerns the property, rights or interests of Allies on Hungarian territory, in several of its stipulations and notably in line *c* of Art. 211, in which Hungary engages itself "not to subject the nationals of allied and associated states, their property, rights and interests . . . to any charge, tax, or impost, direct or indirect, other or greater than those which are or may be imposed upon nationals or upon their property, rights or interests"; and in Art. 233 *b* which has its correlative in all the other Treaties (Versailles 298, St. Germain 250, Neuilly 178) in which Hungary engages itself "not to subject the property, rights or interests of the allied or associated powers to any measures infringing property rights which are not equally applied to the property rights or interests of Hungarian nationals"; that if the same line adds "and to pay appropriate indemnities whenever such measures may be taken," it may be remarked that this does not contemplate as a sanction the jurisdiction of the Mixed Arbitral Tribunal, which would only constitute a just counterpart if this competence had been accorded to take cognizance of expropriations sustained by Hungarian subjects in ceded territory,

and if these Tribunals had to take cognizance of every violation of common international law;

Whereas, the application of the principle of equality of treatment was demanded by the Hungarian Government itself at the preliminary negotiations preceding the conclusion of the Treaty of Trianon; that first, in the note No. 8 of January 14th, 1920, which advised the Peace Conference of the dangers which would result for Hungarian property in ceded territory from certain projects of agrarian reform in Czechoslovakia and in Roumania, the Hungarian Government demanded so far as concerns Roumania an express stipulation in which it was read that "physical persons or corporations belonging to the Hungarian minority shall not suffer, either in law or in fact, any treatment different from the point of view of their material interests from that of Roumanian nationals having Roumanian nationality"; that as a result of the observations presented by the Hungarian delegation on Art. 250 (Note 37 in the documents published by the Hungarian Minister of Foreign Affairs, Budapest, 1921, 2 v. under the title "Hungarian Peace Negotiations"), the latter, containing the tenor of Art. 250 so far as concerns the exemption from seizure and liquidation, believing that these provisions did not protect Hungarian property against an eventual Roumanian or Czechoslovakian expropriation demand "a reassuring declaration providing that no property belonging to our nationals and located on the territory of the former Austro-Hungarian Monarchy shall be sequestrated, liquidated or expropriated in virtue of a legal provision or by any special measure which, under the same circumstances, does not apply to the subjects of the legislating state or to the state executing such measure"—a reassuring declaration which moreover was refused by the Conference (letter from the President of the Conference);—that it follows from all these acts that national treatment constituted the maximum of the demands of the Hungarian Government itself so far as concerns the protection of Hungarian property in ceded territory;

Whereas a further proof of the spirit which dominated the drafting of the Treaty so far as concerns the status of ex-enemy property in allied countries, is found in the letter of August 13th, 1919, addressed by the President of the Commission of New States and the Protection of Minorities to the Czechoslovak delegation, a letter cited in the argument; that this delegation at the time of the drafting of Art. 3 of

the Minority Treaty (whose content corresponds to Art. 63, paragraph 4 of the Treaty of Trianon) which contemplates that Hungarian optants shall be free to retain the immovable property which they possess in Czechoslovak territory, having demanded the subordination of this right of optants to the condition that their property shall be subjected to the same régime as that of Czechoslovak nationals, reply was made to them "that it did not seem to the Commission that the insertion of a supplementary clause was necessary to maintain without preference of any kind under the régime of Czechoslovak law, all the goods and property situated on Czechoslovak territory";

Whereas, therefore, it can nowhere be deduced that a special privilege of any kind was established in favor of Hungarian property in ceded territory, and that it is necessary to deny, as at least hazardous, the extreme thesis presented in the written proceedings and advanced during the oral argument that the immovable property of Hungarians in Transylvania enjoys beyond international common law a veritable privilege or a kind of mortgage on Transylvania which has been accorded them as a compensation for the dismemberment of Hungary and as a condition of the transfer of the territory;

Whereas, the radical vice of the thesis of privilege consists in the dangerous affirmation that Art. 250 refers, by the exclusion of liquidation, to international common law, by which that Article forbids, under sanction, every violation of that law; that in order for that to be true it would follow that every violation of international common law constitutes a liquidation—which cannot be demonstrated for the good reason that the scope of the two concepts is not identical, the idea of "violation of international law" being far wider than that of "liquidation";

Whereas this thesis, resting upon a *petitio principii,* because it assumes what it was necessary to prove, is unacceptable, its consequence, namely, the complementary thesis which attributes to the Mixed Arbitral Tribunal jurisdiction to take cognizance not only of every violation of or affront to international common law, but also of every appearance or possibility of violation, is equally invalid;

Whereas the theory of the Mixed Arbitral Tribunals as the perpetual guardians of international common law, invalidates itself by the inadmissible consequences to which it leads; that by admitting this theory, these Tribunals, exceptional courts with limited jurisdiction,

would become by this fact courts of the widest international competence known, this jurisdiction having no other limits than the vague concept of international law; that by this formidable extension of jurisdiction, these Tribunals would have to take cognizance not only of everything which touches lightly or severely property, rights and interests of Hungarian nationals in ceded territories but they would also be able to exercise control over all internal legislation of the succession states, from their fiscal laws and their application to their most vital social laws, and to their constitution itself, which would be the equivalent in last resort of admitting that the Treaty of Trianon subjected Roumania, Czechoslovakia, the Jugoslav State, for the benefit of Hungary, to a kind of régime of capitulations, more extended and more humiliating than that which was placed upon the non-Christian countries;

Whereas, from all these considerations it follows that Art. 250 can only be applied on the hypothesis that it involved a seizure and liquidation with a view to reparation; that a measure of expropriation by way of agrarian reform, non-differential in character, cannot be regarded as a liquidation, which alone is within the jurisdiction of the Mixed Arbitral Tribunal; that even if one regards such an expropriation as an affront to international law by the fact that the indemnity allowed to the expropriated owners is insufficient, the examination of the cases before us showed that the rules which determined indemnity are the same for Roumanian and for Hungarian owners, and that in any case it is not within the jurisdiction of this Tribunal to take cognizance of such an affront to international law;

Whereas, under these conditions the Tribunal cannot, contrary to specific texts and contrary to the principles which ought to govern, extend its jurisdiction without committing a manifest abuse of power;

For these reasons,

The undersigned arbitrator is of the Opinion that the Mixed Arbitral Tribunal is not competent to take jurisdiction for the purpose of examining on the merits the cases now submitted for its consideration.

(Signed) Antoniade.

Paris, January 10th, 1927.

VII

Application by the Hungarian Government to the Council of the League of Nations

for the appointment, in conformity with the Treaties, of neutral deputy arbitrators in the matter of the withdrawal by the Roumanian Government of the Roumanian member of the Roumano-Hungarian Mixed Arbitral Tribunal.

[*Translation.*]

London, May 21st, 1927.

Sir,

The undersigned, Delegate of the Kingdom of Hungary to the Council of the League of Nations for *the question of the withdrawal by Roumania of the Roumanian member of the Roumano-Hungarian Mixed Arbitral Tribunal in certain cases affecting Hungarian nationals,* has the honor, under instructions from his Government, to make hereby a formal request to the Council of the League of Nations to appoint at its next session, in virtue of Article 239 of the Treaty of Trianon, two deputy arbitrators, to be selected from among nationals of Powers which remained neutral during the world war.

This request needs no argument in its support beyond the fact that no such deputy arbitrators have yet been appointed for the Mixed Arbitral Tribunal in question. The above-mentioned provisions of Article 239 of the Treaty of Trianon and the identical clauses in the other treaties, particularly the Treaties of Saint-Germain and Neuilly, were applied in this sense by the Council in 1923, at a time when there did not appear to be the slightest risk of a vacancy in any of the six Mixed Arbitral Tribunals—the Franco-Hungarian, Franco-Austrian, Franco-Bulgarian, Belgo-Hungarian, Belgo-Austrian, and Belgo-

Bulgarian then sitting. These tribunals discharged their duties in the normal way and were presided over by persons selected by agreement between the parties concerned; nevertheless the Council appointed deputies. On the occasion of their appointment, Hungary, Austria, and Bulgaria were not even invited to be represented in the Council, which shows that the matter was regarded as beyond question a duty directly incumbent on the Council in virtue of the treaties and in the interests of international order and the observance of the treaties. Further, the letter on this subject addressed to the League by M. Poincaré, then Prime Minister of the French Republic, and quoted by the rapporteur on the question in his draft resolution (*Official Journal,* 1923, No. 3, page 399—Document C.101. 1923), points out that the fact that the Council had not up to that time designated deputy arbitrators for those tribunals was due to an *"omission,"* although the tribunals in question had presidents elected by the Powers themselves.

I have already had occasion, in my remarks at the last Council session, to refer to these precedents, as also to the precedents of the German Mixed Arbitral Tribunals, which are even more closely similar to the present case, inasmuch as there also national arbitrators had already been withdrawn.

I have the honor to enclose, for the use of the Members of the Council, copies of the Council's own documents on these questions.

The present case is more serious than any similar case that has yet arisen, because Roumania has withdrawn her arbitrator with the deliberate object of preventing arbitration in a specific series of cases in which the Tribunal has already decided certain points of detail in a manner unfavorable to the Roumanian case. Roumania would undoubtedly have accepted those same decisions had they been favorable to her. This attempt at evasion becomes still more serious inasmuch as it is alleged to be covered by the League of Nations. It is in fact an attempt to make improper use of the authority of the League for a purpose for which the League was not created, and its only result would be to provide, with the help of the League, an illustration of how a country could, if it wished, evade an arbitral jurisdiction unfavorable to its case.

There is no need to repeat what I said at the last session, namely, that the *definitive* character of an arbitral award rendered by a Mixed Arbitral Tribunal—a character which is expressly laid down in Article

239 of the Treaty of Trianon and the corresponding articles in all the other treaties, and which by definition is inherent in all arbitral awards —completely precludes any possibility of their being revised by any other court. To institute proceedings in another court simultaneously with the proceedings in the Arbitral Tribunal would in itself constitute a serious infringement of the principle of the independence of international tribunals and of the stipulations of the treaties.

It was therefore out of pure generosity, and in the hope of putting an end to dangerous discussions which could only lead to unfortunate results, that I, as Delegate of the Hungarian Government, made an offer to Roumania at the last session to appeal to the Permanent Court of International Justice to arbitrate, on the basis of a special agreement, the only question which can arise outside the strict limits of the provisions of the Treaty—namely, whether in the actual case any weight can be attached to Roumania's allegation that the Roumano-Hungarian Arbitral Tribunal in rendering its awards has been guilty of exceeding or usurping powers. Proof of Roumania herself not taking seriously the allegation of exceeding or usurping powers was furnished immediately, for Roumania at once declined to enter into judicial proceedings even on this point. Hungary cannot be asked for any further display of generosity without thereby being asked to consent to the revision of the Treaty of Trianon itself.

This Roumanian policy of attempting to evade judicial proceedings in cases of violation of the Treaty by arrangements incidental to the Roumanian agrarian reform has already been in operation for some years and has found expression in a variety of forms. It was particularly surprising, therefore, to hear the Roumanian representative open his statement at the last Council session by saying that the question had already been settled four times. By whom had it been settled? In the present position as regards these cases, the Mixed Arbitral Tribunal is, in virtue of the Treaties, the only court entitled to try them. The Tribunal cannot be interfered with in the exercise of its duties without the Treaties' being violated.

It is deplorable that Roumania should already have succeeded in delaying for another three months the already slow operation of the Roumano-Hungarian Mixed Arbitral Tribunal simply by arrogantly announcing through her legal representative that she is withdrawing her arbitrator, and by making representations, unique in their kind,

to the League. The attached documents give some idea of the manner in which the free operation of justice has already been hindered by Roumania's action.

But there is hardly a single Mixed Arbitral Tribunal whose working has not been more or less upset, or at least the efficacy of whose decisions has not been endangered, as the result of the example set by Roumania. This is well-known to all who know these matters from the inside; and the incident in the Franco-Turkish Mixed Arbitral Tribunal has even been the subject of Press comment.

It is not too much to say that Roumania is threatening to call in question the fundamental principles which underlie international justice in general, and the practice unanimously established, in the special matter of "liquidations" and the protection of the private property of foreigners, by all the Mixed Arbitral Tribunals (of which there are about 40) and by the Permanent Court of Arbitration and the Permanent Court of International Justice. These principles are: that international law must prevail over national law—the principle on which international law itself is founded; that there is no appeal from arbitral awards, particularly the awards of Mixed Arbitral Tribunals; that judicial bodies are independent of political bodies, even in international life, and that they prevail over political bodies (that being the very reason why they are judicial bodies); that it is essential that judicial decisions should be secured against arbitrary action on the part of the losing parties; and other principles more particularly: the principle that in matters concerning "measures of war" and "measures of disposal," or "confiscation" and "liquidation," differential treatment of enemies or ex-enemies is not an essential point; the principle, which has been firmly established in international law for centuries, that an alien cannot be deprived of his property without suitable compensation, no matter how the State may treat its own nationals on that point; and so on and so forth.

Since they first took up their duties, the various Mixed Arbitral Tribunals have rendered hundreds of awards in which these principles have been applied, mainly against Germany; and other cases are still awaiting their decision on the same lines. The two highest international Courts have definitely decided the same question in the same sense—the Permanent Court of Arbitration by its award of October 13th, 1922, in a case between Norway and the United States of America,

and the Permanent Court of International Justice by its Judgment No. 7 delivered on May 25th, 1926, in a case between Germany and Poland. (The United States requisitioned Norwegian ships, as they were then requisitioning ships belonging to American citizens, without paying full compensation. Poland seized immovable property belonging to German nationals without compensation, and argued—again without success—that there was no differential treatment; the judgment indeed give a classic definition of "liquidation," which is by no means a Hungarian invention, as the Roumanian representative suggested.)

If you listen to the specious arguments advanced by Roumania against the twenty-two awards of the Roumano-Hungarian Mixed Arbitral Tribunal, which are entirely based on the same principles, you will be countenancing the destruction or at all events the weakening—just at the moment when international arbitration is really coming to life—of the authority of all the other arbitral awards which have recently been rendered or will shortly be rendered.

The other criticism directed by Roumania against the 22 awards in question consists in the allegation that they do not settle certain essential points in the problem. The Roumanian representative has been good enough to enumerate these points. Since, however, the awards deal exclusively with the question of jurisdiction, their alleged defects are really virtues. Problems connected with the merits of a case cannot be settled in awards on the question of jurisdiction. If the Roumano-Hungarian Mixed Arbitral Tribunal has taken the opposite line, Roumania would undoubtedly have made the opposite complaint, namely, that the Tribunal's awards on the question of jurisdiction settled problems connected with the merits of the case, Roumania having been unable to defend herself on these latter questions in written and oral proceedings specially opened for the merits of the lawsuits. Judgment No. 6 of the Permanent Court of International Justice, which also deals exclusively with jurisdiction, and which preceded Judgment No. 7, likewise does not settle the points which the Roumanian representative would rather have had settled in awards dealing with jurisdiction. In this respect also the twenty-two awards on the jurisdiction of the Roumano-Hungarian Mixed Arbitral Tribunal do not depart from the correct rules of law and the classic models of international jurisdiction on the subject.

In the statement he made to the Council at its last session, the

Roumanian representative attached much weight to an imaginary Brussels Agreement dealing with the substance of the question or with one of its details. His allegations on this point form such a large part of his remarks that the Hungarian Government is reluctantly forced to make some reply, however brief. The alleged agreement simply does not exist, and in answer to the propaganda which had given rise to the belief in its existence, Hungary has already on many occasions given an absolute denial. The whole castle in the air that has been built up around this question is nothing but a fabric of errors which many people have been induced to believe without question, all based on the imaginary existence of an initialed "arrangement." The truth is that no such text ever existed, nor was it even suggested at Brussels. An exchange of notes or some other form of document between the parties was proposed by the Hungarian negotiators at Brussels, and it was the Roumanian representative himself who rejected the proposal. The *"Account of the conversations,"* as the name in itself clearly shows, were never regarded as an instrument of agreement between the parties, but merely as a report for office use, drawn up by the League officials for the information of the Rapporteur, who was not present at the conversations on the main question; and—a fact which is still more important—these minutes *were never initialed by anybody.*

In all probability, indeed, the original of this "Account of the conversations" was no longer at Brussels when five lines only of a "draft resolution" drawn up by the Rapporteur—an entirely different document—were initialed. This happened at a different place from that where the conversations on the main question had been held, and on a different day, after all those present had recognized with one accord that it had proved impossible to reach an agreement between the parties either on the fundamental question as a whole, or on any detail of it, and after *all those present* had reassured the first delegate of Hungary, *that the main question was still unsettled, and could be re-opened by his Government at a more auspicious moment.* After all, how could it have been otherwise when a delegate was asked to initial, and did initial, five lines of a *"draft Council resolution"* two months before the opening of the Council session, at which that draft resolution would have to be discussed and passed before it could be binding on anybody? This confusion, between the "Account of the conversations" that were

not initialed and the five lines of the "draft resolution" that were, had not been realized at all, when the negotiators parted at Brussels. It was only created afterwards, and gradually, but unfortunately, it must be admitted, that it was created most successfully. Every time the Brussels negotiations were mentioned, something was added to the fabric. At the last Council session, the new idea was that the Hungarian representative had abandoned the rights secured to Hungarian nationals in the Treaty of Trianon and had merely upheld his claims on grounds of general international law. This idea was not even discussed at Brussels.

All this confusion, however, and all these errors, decide nothing; they cannot create after the event a legal foundation which does not exist.

In the whole of the Brussels "Account of the conversations"—a document with which the Hungarian representatives had nothing to do, and in the drafting of which they could not be concerned in view of the circumstances of its composition—the only passage that they confirmed in its form and substance was the written declaration which they themselves inserted. Its insertion could not be refused, because it constituted an annex to their full powers, and they insisted that it should be reproduced word for word, in inverted commas, in any record of the conversations that might be drawn up by others. The declaration was inserted near the middle of the "Account of the conversations." It reads as follows:

"The Hungarian representative desires to point out, that the meeting at Brussels was held for the purpose of showing a conciliatory spirit and reaching a settlement by compromise and of discovering a solution of the matter, by means of an agreement in which both parties would make certain concessions. He takes this opportunity of declaring solemnly on behalf of his Government that *he is most desirous of entering into negotiations with the representatives of Roumania on the two essential points of the dispute, namely, the limit of expropriation and the amount of compensation to be granted to Hungarian optants.* He assures the Roumanian representative that he will be met with the utmost goodwill and a most conciliatory spirit on the part of the Hungarian negotiators, who *have been furnished with full powers to treat regarding these questions.*"

It will be seen that the Hungarian Government made an open offer at Brussels, but that offer was rejected by Roumania. That was the only essential thing that happened at Brussels in connection with the fundamental question. It afforded a basis on which a real agreement might have been reached at Brussels. But who could really believe that the Hungarian negotiators at Brussels abandoned *all* the rights of Hungarian nationals in defence of which they themselves, and their Government, had done all in their power? Why should they have acted so? The Roumanian representative's little joke about the lengths to which the Hungarian Government's first delegate carried his courtesy is not only extremely ungracious, but as an argument, it rebounds entirely upon the Roumanian representative himself.

The reason why the Hungarian Government repudiated its first delegate was not that it feared that he had agreed to an arrangement on the fundamental question. Before the repudiation, the other side did not go so far as to maintain the existence of any such arrangement; the Brussels conversations were still too recent for such a suggestion to be possible. *The Hungarian Government repudiated him because it was unwilling to admit any semblance of a settlement when the fundamental problem had not been solved. It said so plainly in its letter to the Rapporteur*—the letter in which it repudiated its first delegate, who had taken part in the premature composition of a draft resolution that concerned only the Rapporteur, without full powers or instructions to do so. In this letter it said:

"To its great regret, the Royal Hungarian Government is unable, in spite of the fact that part of the text has been initialed by one of its representatives, to accede to the draft resolution.

"It is the less able to do so in view of the fact that this resolution does not settle the fundamental question, but leaves the juridical problem open, as is expressly stated in the draft report.

"This draft resolution does not provide any solution, but merely offers advice of a political nature which lies outside the problem.

"Hungary considers that she would be fully entitled to obtain a decision on the merits of the case, even if only on the basis of Article 11 of the Covenant, which refers to good understanding between the parties, for such good understanding cannot be established by leaving

the problem unsolved, but solely by settling the dispute with every guarantee of justice and all the safeguards which a legal solution provides."

(It is unfortunate that this important text was not reproduced in the *Official Journal* of the League of Nations.)

It is true that the repudiation by the Hungarian Government had no effect, for the Council was unwilling—because it was not entitled —to deal with the fundamental question involved. *But this does not mean that, by not accepting the repudiation, the Council approved an arrangement on the substance of the case, which never existed at all.*

The Council of the League did not, at its meeting of July 5th, 1923, deal with the substance of the question, and merely endeavored to improve the atmosphere when relations were momentarily strained between the two parties, because it lacked competence to do otherwise. The juridicial situation has not altered since then, except that now it would be even less possible than heretofore for the League of Nations to consider the substance of the question, because at the present time *sub judice lis est.*

The 22 (or respectively 350) cases are before the competent arbitrator. What both States concerned are bound to do under Article 11 of the Covenant, is patiently to await the arbitrator's final decisions. There can be no safer or better system of ensuring peace and good understanding between nations than the procedure of arbitration. In this case, we have such procedure established by the treaties themselves. The treaties also lay down that the Council shall ensure its free operation.

To refuse to appoint deputy arbitrators, or to subordinate such appointment to any conditions, would be to subject the awards of the Mixed Arbitral Tribunal to supervision by the League—and that would be a serious violation of the treaties.

The Council of the League would not be able—even if it were entitled to do so—to examine satisfactorily the awards given by the Mixed Arbitral Tribunal. For that purpose it would have to possess the complete files of all the cases in order to see exactly what was the point in dispute in each case. It would have to examine these documents according to definite rules of procedure and would have to possess the time and equipment necessary for such long and meticulous

work. Speeches, however detailed, by representatives of the Powers concerned can after all never serve as a basis for the reversal of awards which have been given under more adequate conditions of enquiry.

The undersigned delegate of the Hungarian Government could never venture to uphold before the Council all the pleas contained in these files, particularly after the said files had been considered by the Mixed Arbitral Tribunal with the assistance of the highest authorities on the subject. It may be added that the ordinary proceeding in writing occupied several months and in the discussions a whole week—and then were devoted solely to the question of jurisdiction. Have we, then, arrived at such a stage in the examination of the fundamental facts of each individual case that we can say whether liquidation had or had not been carried out? Who would venture to claim that he could give forthwith, an opinion about this question, particularly in appeal, with the possible result of depriving the petitioners of the judge provided for under the treaty?

The undersigned delegate would merely venture respectfully to draw the attention of the Council to the fact, that certain statements made by the honorable representative of Roumania give a distorted view of the action brought by Hungarian nationals in the Mixed Arbitral Tribunal.

For instance, these actions are not aimed at the whole agrarian reform throughout Roumania; far from menacing the State, they would not even endanger the agrarian reform itself, even if all the petitioners succeeded in their claim, which is obviously doubtful. The actions are only concerned with those portions of the measures adopted which the Mixed Arbitral Tribunal *ought* to designate as "seizures" or "liquidation," namely, the portions of these measures which are contrary to the Treaties. To whom would you propose to entrust the delicate task of identifying true cases of liquidation among so many complicated disguises, if not to the Mixed Arbitral Tribunal, which is best qualified and equipped to deal with these matters and which the Treaty has rightly chosen to carry out the work?

Hungary herself has, since the war, carried out far-reaching agrarian reforms, but in so doing she has not infringed general international law or her obligations under the Treaty of Trianon, although her obligations under Articles 232 and 233 of this Treaty are more

burdensome than those imposed on Roumania, in Article 250 dealing with the same matter; the depreciation of her currency has also been far more serious than that of the Roumanian currency. A few documents, which are attached hereto, will show that Hungary has avoided all violation of international law in carrying out her agrarian reform. In further proof it might be pointed out that Hungary has also on many occasions been threatened with actions in the Mixed Arbitral Tribunal by nationals of the Succession States under Articles 232 and 233 of the Treaty of Trianon on the ground of the agrarian reform measures applied by her to these persons' property. Yet in no instance have any proceedings actually been instituted against her, for she has taken care to satisfy all just claims made against her in the name of international law. Why should it be impossible for Roumania to carry out the details of her agrarian reform in conformity with her international obligations?

Again, it is a misrepresentation of facts to claim that the argument put forward by the representatives of the Hungarian nationals—who were, as we have said, the highest international law authorities in France—was essentially this: "that a State could liquidate the property of ex-enemies *bona fide.*" What they argued in fact was, that the Treaties do not, in this respect, call for any enquiry into the good or bad faith of States; they were concerned solely with results. The Hungarian nationals could not therefore be compelled by the other party to make any statement or furnish any evidence in this respect if, under the treaty, they were not obliged to do so. They added, however, that, if the Court itself, and not their opponent, called for such proof, they could provide it. That is obviously quite another matter.

It is also incorrect to claim that the 350 actions were all brought to maintain privileges, and did not in any way concern differential treatment. On the contrary, all the petitioners state that they have received differential treatment; they only objected, in the course of *the discussion on jurisdiction,* that, as differential treatment was not a factor exclusively confined to the question of "seizures" and "liquidations," they were not bound to prove such differentiation *a limine litis.* The treatment given to Hungarians in the Roumanian Agrarian Reform Law was indeed differential in many respects. Not only is the Agrarian Reform Law for Transylvania twice as radical as the law

in the old territory of the Kingdom, but, as the agrarian situation itself in Transylvania was about 80 to 100 years in advance of that in the old Kingdom, even an agrarian reform law of absolutely equal incidence would have been—and without justification—far more harsh in Transylvania than in the old Kingdom. In the Transylvania law, moreover, special provisions have been inserted in various places, which sometimes had very little connection with true agrarian reform, and which are, in fact, only aimed at the liquidation of the property of Hungarian nationals, and sometimes solely a special category of Hungarian nationals: *i.e.* persons entitled to opt. In 1923, part of these differential legal provisions were rendered even more harsh, in their application to Hungarian optants, by three ministerial decrees of a practically secret nature, which changed the character of the law under the cloak of an interpretation. Other rules and instructions added entirely new excuses for differential treatment to those already existing under the law. Finally, all of these provisions are applied by the executive organs in so differential a manner to the detriment of Hungarian nationals that, in the long run, *almost the whole of the property of all Hungarian owners has been confiscated on some pretext or another, whether the estates were small, medium-sized, or large, in toto, "by means of agrarian reform," without any compensation. It cannot be claimed that all Roumanian nationals would have been treated in the same manner.* The differentiation is perfectly obvious, and the Mixed Arbitral Tribunal has duly decided to reserve consideration of this point until it comes to consider the substance of each case. Let us leave it to complete its task in peace; it is a high organ of international justice, with a very broad outlook, and it is scrupulously conscientious in its work; it is well able to take all considerations into account.

The honorable representative of Roumania has also found it necessary in his speech to criticize the attitude adopted by the Hungarian representatives at Brussels, who did not then say to him on behalf of their Government: "If you apply the Agrarian Law to Hungarians in one way and to Roumanians in another, I shall send my nationals to plead their case in Paris." It was not necessary for the Hungarian representatives to employ such threats at Brussels. The Roumanian representative was quite well aware that he was at Brussels because his Government had previously refused to accept the diplomatic representations which the Hungarian Government had made "on several

occasions," with a view to securing the application of *"Articles 63 and 250 of the Treaty of Trianon,"* as has been expressly recognized in the Roumanian Government's Note of February 28th, 1923, to the Hungarian Minister Plenipotentiary at Bucharest. A printed copy of this Note was included as Annex No. 3 in each copy of the Hungarian Petition of March 15th, 1923, which was sent to the League of Nations. It was therefore in the hands of the Roumanian representative at Brussels during the whole of the negotiations, as was the Petition itself. It was not necessary to draw his special attention to this document. (A copy of this note is annexed hereto.) The Roumanian Government was quite well aware that the Hungarian nationals were determined to apply to the Mixed Arbitral Tribunal, and that the only object of the Hungarian Government's representations to the League of Nations in 1923 was to discover a means of settling these questions before any irremediable measure had been taken and with greater speed than would be possible in the Mixed Arbitral Tribunal. These negotiations having failed, action in the Mixed Arbitral Tribunal became inevitable. The Roumanian Government was so well aware of this fact that it endeavored to prevent the working of this tribunal by creating difficulties in connection with the election of its president. Consequently, one year later, in 1924, the Hungarian Government was again obliged to apply to the League of Nations, this time to ensure the proper working of the Court, by requesting the Council to elect its president.

Nor would it be possible to reply before the Council, in as much detail as procedure in appeal would require, to the Rounmnian representative's rather vague assertion that, during the agrarian reform, Hungarian nationals were treated in the same way as all other foreigners in Roumania. The Roumanian representative concluded that the Hungarian nationals could have no cause for complaint if they received the same treatment as other foreigners. Very succinctly we must reply, first, that there were really no foreign owners of landed property in Roumania itself, that is to say the former territory of the Kingdom. As early as 1866 foreigners were prohibited under the Constitution from acquiring country estates. The very few foreigners who owned rural property were Roumanian women married to foreigners, or perhaps in some instances their heirs. Moreover, this far from numerous class of foreign rural owners was under the perpetual threat of expropria-

tion under the Constitution and apart from all agrarian reform. Most of these owners were also absentee landlords living continuously abroad and paying the double taxation of absentees. It is obvious that such property was likely to receive harsh treatment under an ultra-radical agrarian reform scheme. In these circumstances, it is also quite intelligible that the countries of which these former Roumanian women and their descendants had become nationals did not consider themselves bound to take any energetic steps on their behalf in the country to which these persons formerly owed allegiance and to which they were perhaps still attached at heart, especially since Roumania had the right to expropriate their estates under her Constitution without any agrarian reform at all. The treatment accorded to this particular category of foreigners cannot possibly constitute a parallel to justify the treatment of Hungarian nationals, who have been established as owners in their own country for the last thousand years and are certainly not absentees. Apart from these pseudo-foreigners there are no others, with the exception of certain British, French, Italian, Russian and polish landowners in Bessarabia, the province in which foreigners were allowed to own country estates. This category of foreigners is far more numerous than the former, but even so, the position of these persons can hardly be compared with that of Hungarian nationals, who are the nationals of a State, which ceded its territory, and who possess interests in the territory ceded by their own State under a vast system of annexation.

It is a fact that the "acquired rights" of foreigners, such as the Hungarian nationals in Transylvania, enjoy rather special protection under the rules of universal international law. Treaties have merely guaranteed, in due form, the same special protection to which such foreigners would otherwise have been entitled, with equal force, under universal international law. Even the group of foreigners in Bessarabia stands in quite a peculiar position in comparison to Roumanian nationals. As will be seen from the attached minutes of a meeting of the Roumanian Parliament, it has received compensation for expropriated land under special provisions which grant it a more adequate compensation than that accorded to Roumanian nationals—practically full compensation in gold. Why should it be impossible for Hungarian nationals also to enjoy the special protection to which they are entitled under international law and, under the Treaty by reason of their

peculiar situation? In addition, this annex clearly shows that Roumania has expended over £1,000,000 sterling to satisfy the special legitimate claims of foreigners in Bessarabia without ruining herself. We know that she will expend an even greater sum than this for the same purpose, in view of the fresh obligations she has quite recently assumed in respect of the same foreign owners in Bessarabia. She will not be ruined by these fresh obligations either. In view of the fact that the forests, vineyards, town-houses, etc., and even a very large percentage of the farmlands taken from the 350 Hungarian nationals which have not yet been allocated to the so-called rightful beneficiaries, *about* half the property claimed by them could and ought to be restored integrally, it should be possible to meet the pecuniary claims of all these Hungarian petitioners by the expenditure of *about* £7,000,000 sterling. This sum is not, as the Roumanian representative stated, greater than the total annual budget of Roumania—it is far less. We have not; however, to consider the total sum, but only the instalments which would have to be paid during a reasonably long period. Such instalments would hardly be noticeable in the case of a country like Roumania. The total sum itself is roughly equal to the value of the movable property which Roumania carried off in the form of booty from present Hungarian territory in 1919 during an occupation which was not authorized by the Great Powers. Not so long ago, Hungary was obliged to forego the restitution of this property in order to secure the signature by Roumania of the Protocol for the financial restoration of Hungary. Hungary, small and maimed, made this sacrifice to save herself; and she has not perished under the weight of the burden. Are we to believe then, that a great country like Roumania would be financially ruined, if she had to pay a like sum? But this question of restitution and payment is a matter for future discussion. The action must first be won on the basis of the facts. These calculations have been made on the somewhat improbable basis, that all the actions brought, without exception, will be successful.

The representative of the Roumanian Government has endeavored to represent the agrarian reform in Transylvania, as intended to save this province from Bolshevism, and the action of the Hungarian nationals, as likely to hinder Roumania's salutary efforts. In the first place—as has already been pointed out—the actions of the Hungarian nationals are not aimed against the agrarian reform itself; they have

been brought in respect of certain cases of liquidation concealed under the cloak of agrarian reform, so that the whole argument based on the need for agrarian reform falls to the ground. Again, the exaggerated and differential expropriation of the property of Hungarian nationals occurred mainly in 1923, whereas the danger of Bolshevist infiltration from the East may be held to have been averted, as far as Europe is concerned, in 1920, after the battle of Warsaw. Finally, Kerensky himself, the author of the policy of defence against Bolshevism by the creation of small peasant proprietors, like all his disciples in this matter, must long ago have seen that homœopathic treatment is not the most effective cure for the malady. Quite the contrary. We need not, however, waste more time in refuting this argument put forward by the Roumanian representative.

The Roumanian representative's assertion, that non-payment for the expropriated property is simply a result of the inflation of Roumanian currency, is all the more amazing because in 1921, when the Transylvanian agrarian reform law was passed, the lei was worth hardly more than 15% respectively 8% of its former value: in the main, *inflation occurred not after but before the agrarian reform in Transylvania.* But even so and even after the law had been passed, a State anxious to honor its financial obligations ought to have stayed application as soon as it saw that the reform would be too costly and would be beyond its financial capacity. Hungary, faced with a similar situation, drew the attention of Roumania at the time, through diplomatic channels, to the dangers, in view of her international obligations, of the policy she was pursuing. But in Transylvania the policy of denationalization absorbed the whole of Roumania's attention and efforts.

The Roumanian representative has on several occasions appealed, in the face of sound legal argument, to major international political considerations. But he might ask himself what civilized Power in Europe, or outside Europe, could really be interested in a policy of allowing Roumania to establish, with the aid and assistance of the League, a doubly harmful precedent of undermining international arbitration and of violating that principle of respect for the private property of foreigners, which is universally recognized and continually invoked under present-day international law.

[Signed] L. Gajzágó,
Hungarian Delegate.

VIII

REPORT OF THE COMMITTEE OF THREE TO THE COUNCIL OF THE LEAGUE OF NATIONS.[1]

This question, as set out in the above title, is only one aspect of the question which was submitted successively to the Conference of Ambassadors and the Council of the League of Nations in 1922 and 1923.

On August 16th, 1922, the Hungarian Government applied to the Conference of Ambassadors in regard to the expropriation—undertaken by Roumania in connection with the scheme of agrarian reform —of the immovable property of persons who, while possessing rights of citizenship (*indigénat*) in the territories transferred to the Kingdom of Roumania by the Treaty of Trianon, had opted for Hungarian nationality under Articles 63 or 64 of that Treaty, and also under Article 3 of the Roumanian Minorities Treaty. The Conference of Ambassadors, in a note dated August 31st, 1922, informed the Hungarian Government that its claims related entirely to the stipulations of the Treaty between Roumania and the Principal Allied and Associated Powers concerning minorities, and should, under the Treaty, be addressed to the League of Nations. On a further request by the Hungarian Government, the Conference of Ambassadors, in a letter dated February 27th, 1923, informed Hungary that she, or another Member of the League should take the initiative in bringing the matter before the Council.

Hungary therefore applied to the League of Nations, stating that a satisfactory solution had not been obtained by direct negotiations, and formulating the following demands:

(1) That the Council should deal with the substance of the question, in view of the urgency of the matter, at its next session;

(2) That it should give a ruling on the substance of the question by declaring that the Roumanian legislative and administrative enact-

[1] League of Nations Document C. 489. 1927. VII.

ments in question were contrary to the Treaties; by ensuring, as regards the future, that Roumania should act in conformity with the provisions of the Treaties; by ordering that the immovable property of Hungarian optants should be restored to them and that it should in future be free from all charges contrary to the provisions of the Treaties; and, finally, that full compensation for damage should be given to the injured parties.

The Council considered this question in April and July, 1923. The proposals made at the April session to refer the question to the Permanent Court to obtain a decision, or even an advisory opinion, were not accepted by the Roumanian representative.

M. Adatci, the Rapporteur, was then requested to prepare the ground for a fresh discussion before the July session of the Council, and the Council expressed the hope that, in the interval between the sessions, the two Governments would do their best to reach an agreement. With this object, the representatives of Hungary and Roumania proceeded, on the invitation of M. Adatci, to Brussels on May 26th, 1923. The results of these negotiations will be found in a report to which a draft recommendation and a summary of the conversations were appended (see Annex 533*a*, page 1011, of the *Official Journal*, August, 1923).

On July 5th, 1923, during the twenty-fifth session of the Council, the Brussels negotiations were the subject of protracted discussions, the Roumanian delegate appealing to the Brussels 'Agreements' and the Hungarian delegate stating that no agreement had been reached. The following resolution was then proposed:

'The Council,

'After examining the report by M. Adatci dated June 5th, 1923, and the documents annexed thereto;

'Approves the report;

'Takes note of the various declarations contained in the Minutes attached to the report of the Japanese representative, and hopes that both Governments will do their utmost to prevent the question of Hungarian optants from becoming a disturbing influence in the relations between the neighboring two countries.

'The Council is convinced that the Hungarian Government, after

the efforts made by both parties to avoid any misunderstanding on the question of optants, will do its best to reassure its nationals;

'And that the Roumanian Government will remain faithful to the Treaty, and to the principle of justice upon which it declares that its agrarian legislation is founded, by giving proof of its good will in regard to the interests of the Hungarian optants.'

The resolution was adopted by all the members of the Council, with the exception of the Hungarian delegate, who refrained from voting and stated that, in his opinion, the whole problem remained open; he added, *inter alia,* that his Government reserved the right to take any further steps which the Treaties and the Covenant of the League of Nations might allow in order to obtain justice for those whom he had the right and the duty to represent.

From December, 1923, onwards a number of applications from Hungarian nationals or optants owning lands in the territories transferred to Roumania were submitted to the secretariat of the Roumano-Hungarian Mixed Arbitral Tribunal, provided for in Article 239 of the Treaty of Trianon, asking, among other matters, that the Tribunal should declare that the measures restricting their right of ownership, which had been applied to their movable and immovable property by the Roumanian State, were contrary to the provisions of Article 250 of the Treaty of Trianon, and that it should order the Roumanian State to make restriction.

In 1925, the Roumanian Government submitted applications objecting to the jurisdiction of the Tribunal. After hearing the counsel of the two parties between December 15th and 23rd, 1926, the Tribunal, on January 10th, 1927, declared itself competent, in virtue of Article 250, paragraph 3, of the Treaty of Trianon, and called upon the defendant (Roumania) to forward her reply within a period of two months.

On February 24th, 1927, Roumania informed the Tribunal that she would refrain from submitting her reply regarding the substance of the question and that, consequently, her arbitrator would no longer sit in connection with any of the agrarian matters brought forward by Hungarian nationals. At the same time, she submitted to the Council, in virtue of Article 11, paragraph 2, of the Covenant, a request to allow

her to acquaint the Council with the reasons on which her attitude was based.

This question came before the Council on March 7th, 1927.

The Rumanian representative explained the reasons which had led the Rumanian Government to withdraw its arbitrator from the Tribunal.

The Hungarian representative asked the Council to appoint, in accordance with the Treaty of Peace, two deputy members to enable the Tribunal to continue its work.

The Council, on the proposal of the President, requested the British representative to report on this question at its next session. Sir Austen Chamberlain having expressed the desire that two of his colleagues should be appointed to act with him for the purpose of examining the question, the Council requested the representative of Japan and the representative of Chile to assist Sir Austen Chamberlain in preparing a report for the next session. The two parties to the dispute accepted this proposal, which was adopted by the Council.

On May 31st, Sir Austen Chamberlain, on behalf of the Committee of Three, convened the Roumanian and Hungarian representatives in London. The conversations took place on May 31st and June 1st. The delegates of both countries stated at the outset that they could not definitely bind their Governments. The Committee first of all heard the additional statements of the two parties and certain particulars which they furnished. The Committee thought it its duty to try all possible means of reaching a final solution by conciliation. In doing so, it was confident that it was fulfilling the wishes of the Council and conforming to the established practice of that body. It therefore asked the delegates to obtain from their respective Governments all possible concessions with a view to reaching a satisfactory solution. On the proposal of the Committee, the delegates of the two Governments agreed to inform the Committee of the point of view of their respective Governments at the June session of the Council.

At the June session of the Council, the Committee of Three met on several occasions at Geneva and maintained close contact with the representatives of the two Governments.

Looking at the problem as a whole, the Committee desired to find a solution which would allay discontent. It could not forget that the matter had originally been submitted to the Council not under Article

239 of the Treaty of Trianon but under Article 11 of the Covenant, and that its intervention had been asked for, on that occasion, first of all by Roumania and then by Hungary. In these circumstances, it could not evade the duty imposed on it by the Covenant and confine itself simply to the election of the two deputy members for the Mixed Arbitral Tribunal, which the Hungarian representative had as a result of the proceedings demanded.

If it did so, it would have failed to discharge its political duties as a mediator and conciliator in a dispute which extended far beyond the actual terms in which it had been originally submitted by the two parties.

Moreover, the Committee could not take a purely and strictly legal view of the Council's duties, especially as it realized that the election of the two deputy members would not have finally ended a difference which had been successively submitted to three international authorities.

On the contrary, it attempted on more than one occasion to bring about a general settlement which would have terminated the controversy and led to better feelings.

The Council, however, had further reasons for not playing a purely mechanical part.

In 1923—as to-day—the two parties stated their points of view at great length and dealt with all aspects of the dispute both as regards substance and form.

The Council has merely followed the discussions of the two parties, and, having regard to the complexity of the problem, it recommended them in 1923 to do everything possible to prevent the question of the optants from becoming a disturbing influence in the relations between the two neighboring countries.

It recommended Hungary to reassure her nationals and Roumania to give evidence of good will in regard to the interests of the Hungarian optants.

Would the question with which we have been dealing since our session last March have arisen if the two parties had followed these recommendations?

The Committee of the Council during its June session submitted certain formulas to the two parties, always with a view to conciliation and in the hope that the two Governments would agree.

The Committee is forced to confess that its hopes have been disappointed and that the two parties have been unable to accept the conciliatory formulas which it proposed.

As the two parties rejected the compromise proposed by the Committee of Three, the latter convened them again on September 2nd, with a view to a final attempt at conciliation. During these fresh conversations, the representatives of the two countries communicated certain proposals to the Committee. The Hungarian representative renewed the offer made in March that the question of jurisdiction of the Mixed Arbitral Tribunal should be referred to the Permanent Court of International Justice, but declared that he was unable to make new concessions. This offer was not accepted by the Roumanian representative, who in his turn submitted certain formulas based on the proposals made by the Committee of Three with a view to compromise. These formulas were rejected by the Hungarian representative. Under these circumstances, the Committee of Three was compelled to abandon its hope of reaching a settlement by direct conciliation.

The Committee was therefore obliged to seek a solution by other methods. A minute examination of the question of the Mixed Arbitral Tribunal's jurisdiction seemed to be of primary importance. It therefore asked the following questions:

1. Is the Roumano-Hungarian Mixed Arbitral Tribunal entitled to entertain claims arising out of the application of the Roumanian Agrarian Law to Hungarian optants and nationals?
2. If the answer to that question be in the affirmative, to what extent and in what circumstances is it entitled to do so?

The Committee, after examining these questions and having them examined by eminent legal authorities, arrived at the following conclusions:

The Mixed Roumano-Hungarian Arbitral Tribunal owes its establishment to the Treaty of Trianon. It is an international tribunal and its jurisdiction is therefore fixed by the terms of the Treaty which created it. It has no jurisdiction beyond that which the agreement of the contracting parties has conferred on it. The limits of its jurisdiction are defined by Articles 239 and 250 of the Treaty of Trianon.

The question at present submitted to the Council for examination

relates to the claims addressed under Article 250 to the Mixed Arbitral Tribunal by Hungarian nationals. The provisions of this article prohibit the retention and liquidation, dealt with in Article 232 and in the Annex to Section IV of Part X of the Treaty, of the property of Hungarian nationals situated in the territory of the former Austro-Hungarian Monarchy. They also provide for the restitution to their owners of goods freed from any measure of this kind and from any other measure of disposal, of administration or of sequestration taken in the period which elapsed between the Armistice and the entry into force of the Treaty. They authorize the submission of claims, by claimants who are Hungarian nationals, to the Mixed Roumano-Hungarian Arbitral Tribunal provided for in Article 239.

If it could be established in any particular case that the property of a Hungarian national suffered retention or liquidation or any other measure of disposal under the terms of Articles 232 and 250 as a result of the application to the said property of the Roumanian Agrarian Law and if a claim were submitted with a view to obtaining restitution, it would be within the jurisdiction of the Mixed Arbitral Tribunal to give relief.

The Mixed Arbitral Tribunal is not competent to give decisions on claims arising out of the application of an agrarian law as such unless the case mentioned in the preceding paragraph arises. In this latter case, the jurisdiction of the Mixed Arbitral Tribunal would not be ousted on the ground that the application of an agrarian law was involved.

Since these considerations show that the claim of a Hungarian national for restitution of property in accordance with Article 250 might come within the jurisdiction of the Mixed Arbitral Tribunal even if the claim arises out of the application of the Roumanian Agrarian Law, we shall proceed to the definition of the principles which the acceptance of the Treaty of Trianon has made obligatory for Roumania and Hungary.

1. *The provisions of the peace settlement effected after the war of* 1914-18 *do not exclude the application to Hungarian nationals (including those who have opted for Hungarian nationality) of a general scheme of agrarian reform.*

Article 250 forbids the application of Article 232 to the property

of Hungarian nationals in the transferred territory. Under the terms of Article 250, the prohibition to retain and liquidate cannot restrict Roumania's freedom of action beyond what it would have been if Articles 232 and 250 had not existed. Even if none of these provisions appeared in the Treaty Roumania would none the less be entitled to enact any agrarian law she might consider suitable for the requirements of her people, subject to the obligations resulting from the rules of international law. There is, however, no rule of international law exempting Hungarian nationals from a general scheme of agrarian reform.

The question of compensation, whatever its importance from other points of view, does not here come under consideration.

2. *There must be no inequality between Roumanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced.*

Any provision in a general scheme of agrarian reform which either expressly or by necessary implication singled out Hungarians for more onerous treatment than that accorded to Roumanians, or to the nationals of other States generally, would create a presumption that it was intended to disguise a retention or liquidation of the property of Hungarian nationals as *such* in violation of Article 250 and would entitle the Mixed Arbitral Tribunal to give relief. The same would apply in the case of a discriminatory application of the Agrarian Law.

The prohibition against the holding of immovable property by Hungarians in the territories transferred to Rumania, even if applied to all foreigners, would not be in accordance with the obligation which Rumania has contracted by the Treaty to permit Hungarian optants to keep their immovable property, but this is a question which does not come within Article 250.

3. *The words "retention and liquidation" mentioned in Article* 250, *which relates only to the territories ceded by Hungary, apply solely to the measures taken against the property of a Hungarian in the said territories and in so far as such owner is a Hungarian national.*

The right which the Allied Powers reserved to themselves under Article 232 to retain and liquidate Hungarian property within their territory at the time of the entry into force of the Treaty applies to

the property of a Hungarian inasmuch as he is a national of an ex-enemy country. It is not sufficient that these measures entail the retention of Hungarian property by the Government and that the owner of this property is a Hungarian. The measure must be one which would not have been enacted or which would not have been applied as it was if the owner of the property were not a Hungarian.

The Committee of the Council therefore ventures to suggest that the Council should make the following recommendations:

(*a*) To request the two parties to conform to the three principles enumerated above;

(*b*) To request Roumania to reinstate her judge on the Mixed Arbitral Tribunal.

The Committee of the Council hopes that the two parties, in so far as each is concerned, will accept these proposals."

* * *

Before reading the three concluding paragraphs of his report, Sir Austen Chamberlain said:

The Committee would have been glad if it could terminate its report at this point, where it proposes a solution honorable alike to both parties and securing justice for both alike; a solution which further permits the normal functioning of the Mixed Arbitral Tribunal—to which we attach great importance, for there are many such international tribunals in existence—to continue with the assent and good will of both parties. But it is possible that one or other party, or even both parties, may, even if the Council adopts the report, refuse to accept these proposals, and we have therefore, reluctantly and with the hope that it may never be necessary to have recourse to them, felt it our duty to suggest to the Council in what way they should deal with any one of these three contingencies.

Sir Austen Chamberlain then read the last three paragraphs:

In the event of a refusal by Hungary, the Committee considers that the Council would not be justified in appointing two deputy members in accordance with Article 239 of the Treaty of Trianon.

In the event of a refusal by Roumania, in spite of the acceptance by Hungary of the above proposals, the Committee considers that the

Council would be justified in taking appropriate measures to ensure in any case the satisfactory working of the Mixed Arbitral Tribunal.

In the event of a refusal of the above recommendations by both parties, the Committee considers that the Council will have discharged the duty laid upon it by Article 11 of the Covenant.

IX

Mémoire
du Gouvernement Hongrois
Adressé, le 29 Novembre 1927,
au Conseil de la Société des Nations
exposant les raisons qui lui rendent impossible l'acceptation des trois principes des juristes du Comité des Trois dans l'affaire du rappel, par la Roumanie, de son arbitre national du Tribunal arbitral mixte roumano-hongrois

Dans l'incident roumano-hongrois, concernant le fonctionnement du Tribunal arbitral mixte dans les affaires dites agraires, le Conseil de la Société des Nations a invité, dans sa séance du 19 septembre dernier, les deux Etats, parties en cause, la Hongrie et la Roumanie, à "ajourner au mois de décembre leur opinion formelle" sur la première partie du rapport, plus spécialement sur les trois principes des juristes, y inclus, adoptés par le Comité des Trois et recommandés, par les membres du Conseil étrangers au litige, à l'acceptation des parties, et de "faire connaître au Secrétaire général assez tôt avant cette réunion du Conseil, leur décision définitive, afin que celui-ci soit à même d'examiner, si cela est nécessaire, quelles autres mesures il peut alors avoir à prendre."

Le Gouvernement hongrois vient de soumettre à un examen nouveau et très minutieux, tout aussi bien la première partie du rapport, que tout particulièrement les trois principes des juristes. Mais, à son grand regret, il a dû se rendre compte de nouveau qu'il lui est impossible de les accepter. Il se permet de communiquer les raisons de cette impossibilité au Conseil de la Société des Nations, ainsi qu'il suit.

I

Tout d'abord, nous nous trouvons, en étudiant le rapport, en face d'une équivoque concernant la nature juridique de l'intervention du Conseil. Sans l'affirmer en toutes lettres, le système de "conciliation" proposé par le Comité des Trois, produit l'impression que, selon lui, le Conseil aurait qualité pour décider sur la question de la compétence du Tribunal arbitral mixte sans se préoccuper de la décision par laquelle ce tribunal, dans l'exercice de ses fonctions, judiciaires, s'est déclaré compétent pour le litige. L'opinion du Comité des Trois semble être contraire à cette décision et, s'appuyant sur une consultation de quelques jurisconsultes éminents, il croit pouvoir proposer au Conseil d'agir sur la base de leur opinion ou, ce qui revient au même, de passer à côté des décisions judiciaires comme si elles n'existaient pas. C'est la seule explication possible du refus d'accomplir le devoir imposé au Conseil par l'article 239 du Traité de Trianon concernant la désignation de juges suppléants au Tribunal arbitral mixte, lorsqu'il y a—pour une raison quelconque—carence. C'est la seule explication du fait, que le Comité des Trois, après avoir déclaré que, dans sa recherche d'une solution nouvelle, "un examen minutieux de la question de la compétence du Tribunal arbitral mixte semblait avoir un intérêt primordial," procède en effet à cet examen et expose, pour les faire sanctionner par le Conseil, les limites dans lesquelles cette compétence devrait être, à son sens, établie. Mais à quoi bon, est-on en droit de se demander, s'il y a déjà à cet égard une décision judiciaire d'un caractère définitif d'après l'article 239 lit.g/ du Traité?

En face de cette tendance manifeste du rapport, tendance contraire à la lettre et à l'esprit du Traité et du Pacte, destructive de l'indépendance de la magistrature internationale, cette clef de voûte de tout l'édifice de la Société des Nations, menant, si elle pouvait prévaloir, à une confusion inextricable des compétences et à l'incertitude permanente du droit, le Gouvernement hongrois se croit dans l'obligation de protester contre elle avec une extrême énergie et de lui refuser tout concours et même toute apparence de concours. Quelle que soit l'opinion scientifique des jurisconsultes consultés par le Comité des Trois, quelle que soit même celle de tel ou tel membre du Conseil, le Conseil dans l'exercice de ses fonctions ne peut se placer ni au-dessus ni en dehors

de la magistrature internationale, il ne peut avoir en face d'une décision du Tribunal arbitral mixte qu'une attitude: celle du respect de la chose jugée. Toute activité se qualifiant de "conciliatrice" qui s'écarterait de ce principe, ne serait plus œuvre de conciliation, mais œuvre de destruction. Nous ne pensons pas que le Conseil veuille s'engager dans cette voie; en tout cas, nous ressentons l'obligation impérieuse de ne pas l'y suivre.

On nous objectera peut-être, qu'il est prématuré de parler de chose jugée dans le litige présent, puisque la Roumanie a soulevé contre la décision du Tribunal arbitral mixte établissant sa compétence, l'exception d'excès de pouvoir. Examinons donc, aussi brièvement que possible, la situation créée par cet acte du Gouvernement roumain et la position que les parties ont prise vis-à-vis de lui. En théorie, nous admettons que l'excès de pouvoir est possible; il y a même à cela quelques rares précédents dans l'histoire de l'arbitrage international. Encore faut-il ajouter que cette exception n'est pas une arme normale du droit procédural, mais un acte de protestation contre une transgression évidente et indubitable du mandat confié à une Cour par le compromis des parties. Or, il est difficile, même pour la critique la plus sévère, de qualifier ainsi un jugement qui se trouve d'accord non seulement avec les opinions émises par de hautes autorités en droit international, mais encore avec les décisions les plus récentes de différentes cours internationales. Le Gouvernement roumain a pourtant soulevé l'objection de l'excès de pouvoir et, malgré ce qu'elle a d'osé en l'espèce, le Gouvernement hongrois ne s'est pas refusé à en tenir compte. Il fallait pourtant qu'il y eût une décision impartiale et faisant autorité à son égard, car il serait absurde de prétendre qu'une pareille allégation présentée par l'une des parties pût par elle-même annuler un jugement; ce serait la fin de toute procédure judiciaire, car il serait bien rare que la partie ayant perdu un procès n'usât pas de ce moyen commode pour se défaire d'un jugement défavorable. Comme, malheureusement, il n'y a pas dans l'organisation présente de la magistrature internationale une Cour de conflit en matière de compétence, le Gouvernement hongrois a proposé de soumettre d'un commun accord la question de savoir s'il y a eu excès de pouvoir dans la décision du Tribunal arbitral mixte, à la plus haute autorité judiciaire internationale existante: à la Cour permanente de justice internationale, avec obligation pour les parties de se conformer à sa décision.

Il nous semble qu'en agissant ainsi, le Gouvernement hongrois, dont les ressortissants étaient en possession d'un jugement favorable, et en face d'une allégation d'excès de pouvoir aussi osée, est allé aussi loin, dans la voie de conciliation, que le respect du droit le permet. A défaut d'une règle de droit positif nous nous sommes inspirés de l'esprit du Pacte, dont l'article 13, sans pouvoir en imposer l'obligation, recommande néanmoins aux membres de la Société des Nations le recours à l'arbitrage dans tout différend d'un ordre juridique, nommément "dans les différents relatifs à l'interprétation d'un Traité, à tout point de droit international, à la réalité de tout fait qui, s'il était établi, constituerait la rupture de la réparation due pour une telle rupture." Rien n'est plus évident que la conformité de notre démarche aux principes énoncés dans ce texte.

Si la Roumanie avait accepté, il serait tout naturel, et nous accepterions très volontiers, que le Conseil suspendît toute action ultérieure, y compris la désignation des juges suppléants aux termes de l'article 239 du Traité, jusqu'après la décision de la Cour permanente de Justice internationale, qui lui aurait indiqué, à lui aussi, la voie qu'il faut suivre. Mais la Roumanie a refusé.

Que peut signifier ce refus? De trois choses l'une: 1° il peut exprimer la prétention de faire accepter comme définitive et inattaquable l'allégation de l'excès de pouvoir, prétention dont nous avons démontre l'incompatibilité absolue avec le principe même de l'arbitrage; 2° il peut signifier une invitation au Conseil à se constituer juge du bien fondé de cette allégation, donc Cour d'appel ou de Cassation des Tribunaux internationaux, fonction qui est en dehors de ses attributions légales, dont l'usurpation serait le renversement du système sur lequel repose la Société des Nations tout entière; 3° ou bien, il vise simplement à créer une impasse qui, de fait, obstruerait l'action du Tribunal arbitral mixte, dont le Traité veut pourtant assurer la continuité en toutes circonstances.

Il nous semble impossible que le Conseil se prête à ce jeu, qu'il sanctionne ou, pour le moins, laisse passer, sans y parer, ce défi lancé au Traité, au Pacte, à l'autorité judiciaire. Il nous paraît évident que le rétablissement de cette autorité et du respect du Traité doit être sa préoccupation principale. Le rapport des Trois ne semble pas avoir donné à ce point de vue toute l'importance qu'il mérite. Dans le préambule de ses propositions, il constate simplement le succès des procédés

d'obstruction que la Roumanie oppose au fonctionnement du pouvoir judiciaire et il semble les accepter comme une attitude légitime dont il faut tenir compte dans la procédure ultérieure. Ses propositions tendent en effet—il l'avoue lui-même—à "chercher la solution par d'autres moyens," lesquels sont: demande adressée aux parties de se conformer à certains principes formulés par un groupe de jurisconsultes, n'ayant d'autre autorité que celle de la valeur scientifique de ces juris consultes, auxquels, pourtant, on peut facilement opposer au moins la doctrine contraire d'autres jurisconsultes éminents; remise en activité du Tribunal arbitral mixte à condition seulement de l'acceptation de ce code nouveau par les parties, afin de mettre le Tribunal dans l'obligation de s'y conformer. Le rapport affirme, il est vrai, que les principes formulés par les jurisconsultes du "Comité des Trois " sont rendus obligatoires, pour la Roumanie et pour la Hongrie, par l'acceptation du Traité de Trianon, mais il ne produit pas même l'ombre d'une preuve à l'appui de cette assertion et, lorsque notre représentant a demandé cette preuve au cours de la discussion, il n'a pas même obtenu de réponse.

Dans la seconde partie de ce Mémoire, nous nous efforcerons de démontrer les défectuosités de la construction doctrinale dont on voudrait nous imposer l'acceptation.

Ici, il suffira de constater le vice d'origine dont tout le système du rapport est entaché et qui, par lui-même, nous interdit de nous y associer. Ce vice originel, c'est la capitulation devant les procédés d'obstruction qu'une des parties en litige oppose au fonctionnement du pouvoir judiciaire établi par le Traité, l'abandon facile du terrain juridique et la tentative de chercher une solution qui passe à côté de lui ou, ce qui est pire encore, essaye de dicter à la magistrature internationale, une ligne de conduite à travers des maximes imposées aux parties.

Tout cela est absolument contraire à la lettre et à l'esprit du Traité autant que du Pacte, done indiscutable pour nous. Nous prions instamment le Conseil de ne pas s'engager dans cette voie funeste, qui ne mènerait qu'à une confusion inextricable entre le domaine politique et celui de la magistrature, confusion destructrice de toute sécurité du droit, à la place duquel on ne trouverait plus que l'arbitraire plus ou moins déguisé. *Omnia fiunt incerta, quando a jure recessum est.*

II

Passant maintenant à l'analyse, selon leur valeur intrinsèque, des principes dont l'acceptation nous est recommandée, nous nous permettons de faire les remarques suivantes:

1. D'abord, d'une manière générale, se rapportant à l'ensemble des principes recommandés:

a) En ce qui concerne la dissertation sur la compétence du Tribunal arbitral mixte qui sert de préambule aux principes, nous trouvons dans cette partie du rapport le text suivant:

"S'il pouvait être établi, dans un cas particulier, que la propriété d'un ressortissant hongrois a été l'objet d'une saisie ou d'une liquidation ou de toute autre mesure de disposition aux termes des articles 232 et 250 par suite d'une application à ladite propriété de la loi agraire roumaine, et si une requête était présentée en vue d'obtenir la restitution, le Tribunal arbitral mixte aurait juridiction pour accorder satisfaction.

"Le Tribunal arbitral mixte n'est pas compétent pour connaître des requêtes soulevées par l'application d'une loi agraire comme telle, à moins que l'hypothèse mentionnée à l'alinéa précédent ne se réalisé. Dans ce dernier cas, la compétence du Tribunal arbitral mixte ne serait pas exclue du fait qu'il s'agirait de l'application d'une loi agraire.

"Comme il résulte de ce qui précède qu'une requête d'un ressortissant hongrois en vue d'obtenir la restitution de la propriété, conformément à l'article 250, pourrait rentrer dans la compétence du Tribunal arbitral mixte, même si la requête a pour origine une application de la loi agraire roumaine, nous passons à la définition des principes que l'acceptation du Traité de Trianon a rendus obligatoires pour la Roumanie et la Hongrie."

Ce texte est en contradiction avec ce qui va suivre et avec la tendance générale du rapport entier qui paraît admettre l'existence d'un excès de pouvoir. Car, dans ce texte, les juristes reconnaissent—et ils ne pourraient faire autrement—que dans certains cas l'application de la réforme agraire roumaine à la propriété d'un ressortissant hongrois *peut* constituer une saisie ou une liquidation ou toute autre mesure de disposition aux termes des articles 232 et 250. Cette thèse est reconnue

très expressément et avec la plus grande clarté dans les passages suivants: ". . . la compétence du Tribunal arbitral mixte ne serait pas exclue du fait qu'il s'agirait de l'application d'une loi agraire . . ., une requête d'un ressortissant hongrois en vue d'obtenir la restitution de la propriété conformément à l'article 250, pourrait rentrer dans la compétence du Tribunal arbitral mixte, même si la requête a pour origine une application de la loi agraire roumaine."

Par cela, les juristes ont reconnu que le Tribunal arbitral mixte est toujours compétent pour rechercher dans des cas concrets des mesures prohibées, même si celles-ci se trouvent cachées sous l'aspect de mesures de réforme agraire.

Ni les requérants hongrois, ni le Tribunal arbitral mixte roumano-hongrois n'ont jamais prétendu autre chose. De sorte que les juristes eux-mêmes se sont trouvés contraints de reconnaître, par cela même, que le Tribunal arbitral mixte roumano-hongrois n'a jamais excédé ses pouvoirs. S'il en est ainsi, toute la base de l'action tout aussi bien de la Roumaine que du Comité des Trois lui-même s'écroule.

On a fait beaucoup état de la manière dont les requêtes des ressortissants hongrois sont formulées. On a prétendu qu'ils exigent l'examen de la réforme agraire *comme telle.* D'abord ce reproche est dépourvu de tout fondement, les requêtes ne demandant que la recherche des liquidations cachées sous la réforme agraire. Ensuite, la façon dont les requêtes sont formulées importe peu. Si les prétentions soulevées par ces requêtes sont illégitimes, le Tribunal déboutera tout simplement les requérants. La petition exagérée d'un requérant devant un Tribunal ne constitue pas un véritable danger pour le défendeur. La Roumanie montre bien peu de confiance dans sa cause, quand elle refuse d'admettre que les réclamations des requérants hongrois soient examinées au fond par le juge compétent pour rechercher si les mesures incriminées sont des mesures prohibées. Si la Roumanie était aussi sûre de la justesse de sa cause que sa propagande le présente au grand public, elle n'aurait rien à craindre, car l'issue des procès ne saurait que lui rendre satisfaction. Dans ce cas, le Tribunal reconnaîtrait que, malgré un procès régulièrement terminé, il n'a pu découvrir les prétendues mesures prohibées et il débouterait au fond les requérants hongrois.

Non seulement les ressortissants hongrois eux-mêmes n'ont pas demandé du Tribunal arbitral mixte d'examiner la réforme agraire *comme telle,* mais ils ont eu à se défendre continuellement contre les

tentatives de la Roumanie qui voulait mêler les problèmes généraux d'une réforme agraire aux débats devant le Tribunal.

De sorte que le Gouvernement hongrois ne sait pas à qui s'adresse cette phrase dans le text introductif des principes des juristes: "Le Tribunal arbitral mixte n'est pas compétent pour connaître de requêtes soulevées par l'application d'une loi agraire *comme telle.*" Certes, elle ne peut s'adresser ni aux requérants hongrois, ni au Tribunal arbitral mixte. Des requêtes contre la réforme agraire *comme telle* n'ont été présentées par personne. Aussi les 22 sentences rendues par le Tribunal arbitral mixte ne font que reconnaître la compétence du Tribunal pour la recherche des prétendues mesures prohibées, même si elles se présentaient sous l'aspect d'une réforme agraire. Cela ressort de tous les considérants qui s'appliquent à ne rien trancher définitivement, mais seulement à faire comprendre que le procès sur le fond aura précisément pour objet d'établir l'existence ou la non-existence des prétendues mesures prohibées. Cette thèse est le même que celle exprimée dans le préambule des principes des juristes.

Bref, l'excès de pouvoir, condition supposée de toute action du Conseil en vertu de l'article 11 § 2 du Pacte, n'a pas été commis par le Tribunal arbitral mixte même d'après l'opinion des juristes.

Jusqu'à tel point, leur opinion est juste.

En constatant ce résultat, nous n'entendons pas nous écarter du principe posé dans la première partie de ce Mémoire, savoir: que le Conseil n'a pas qualité pour réviser le jugement du Tribunal arbitral mixte établissant sa compétence ou n'importe quelle autre décision de ce Tribunal et d'en décider selon ses lumières; que, par conséquent, l'opinion des jurisconsultes, fût-elle adoptée par le Comité des Trois ou même par le Conseil, ne saurait avoir qu'une valeur scientifique. Nous constatons simplement que le travail scientifique des expertes ayant abouti dans ce préambule de leurs propositions à la conclusion de reconnaître la compétence du Tribunal arbitral mixte en la matière sous litige, il est absolument inexplicable que ces mêmes experts croient, néanmoins, pouvoir proposer au Conseil des résolutions touchant au fond de la question dont ce Tribunal est saisi, ce qui implique donc une immixtion à peine déguisée dans sa juridiction, une tentative de lui prescrire, par voie détournée, une ligne de conduite dans un procès déjà engagé. Même en se plaçant au point de vue des experts, il y a contradiction manifeste entre les deux parties de leur rapport.

Tant que le délicat travail de la magistrature compétente est en suspens, le devoir de tout le monde, mais surtout d'un organisme politique international puissant, tel que le Conseil de la Société des Nations, est d'attendre et de s'abstenir de toute immixtion dans le travail de la magistrature.

Ayant constaté, le texte du rapport en main, que les juristes eux-mêmes ont été forcés, par la logique des choses, de reconnaître la compétence du Tribunal arbitral mixte, en ce qui concerne la recherche des mesures prohibées, même si celles-ci se présentent sous l'aspect d'une réforme agraire, et ayant montré que, jusqu'à présent, le Tribunal arbitral mixte n'a énoncé dans ses 22 sentences rendues sur sa compétence rien d'autre que, précisément, la reconnaissance de sa compétence, nous pourrions cesser toute critique ultérieure de l'œuvre des juristes. Car, par cela même, nous avons démontré que cette œuvre qui s'occupe de questions de fond et non pas de compétence n'a pu voir le jour que grâce à une erreur qui veut attribuer au Conseil des pouvoirs qui, d'après le Traité, reviennent exclusivement au Tribunal arbitral mixte, à savoir le pouvoir de résoudre les questions de fond des procès rentrant dans la jurisdiction du dit Tribunal arbitral mixte.

Ceci posé, nous pourrions adresser, avec le surcroît de force que nous donnent les constatations théoriques des jurisconsultes, tout simplement la demande au Conseil de bien vouloir cesser tout examen ultérieur de l'affaire, et mettre le Tribunal arbitral mixte, en conformité des devoirs lui imposés par l'article 239 du Traité de Trianon, en état de fonctionner. Le contraire équivaudrait à une entrave voulue mise au fonctionnement d'une Cour de justice internationale.

b) Mais il nous faut encore examiner une autre erreur fondamentale dans l'œuvre des jurisconsultes.

Même, d'après leur thèse, le Tribunal mixte doit donc être libre de retenir sa compétence dans chaque cas concret où un ressortissant hongrois prétend que la réforme agraire appliquée contre lui constitue, en réalité, une mesure prohibée. Rechercher la matérialité des faits et la justesse de cette allégation, en comparant les faits à la lettre et à l'esprit des stipulations du Traité, relatives aux différentes formes des mesures prohibées, c'est précisément l'objet du procès. Pour que le Tribunal arbitral mixte puisse accomplir cette tâche, il faut ouvrir sa porte et non pas la fermer d'avance. Le Tribunal ne peut rechercher

ni la matérialité des faits, ni la justesse des allégations, si on lui défend d'entrer dans le procès.

Les questions qui se posent ici, ne peuvent être éclaircies *in limine litis,* étant des problèmes du fond et non de la compétence. Le rapport veut les faire accepter comme des conditions de la compétence. C'est là une autre erreur.

Faire accepter des solutions problématiques, même erronées, ainsi que nous allons le voir, sur des questions de fond, en guise de règles, fixant la compétence, signifierait vouloir obliger les requérants hongrois à gagner leur procès sur le fond avant de pouvoir les commencer. C'est plus que de la confusion.

c) Ainsi que nous y avons déjà fait allusion dans le § *a*), la décision des questions de fond, se rapportant à l'article 250, 232 et son annexe, appartient, d'après le Traité lui-même, exclusivement aux Tribunaux arbitraux mixtes. L'exécution de cette partie du Traité est confiée, par le Traité lui-même, à ces Tribunaux, présidés par le ressortissant d'un État resté *neutre* dans la guerre mondiale. On ne peut pas retirer la solution de ces problèmes à leur compétence, sans violer gravement le Traité. Aucune considération politique ne constituerait une excuse à pareil procédé. La souveraineté de ces Tribunaux dans ce domaine est un dogme des Traités et l'inviolabilité des Traités est, à son tour, un dogme de la Société des Nations; ainsi qu'il résulte du préamble du Pacte.

Mais il existe encore, en l'espèce, une considération spéciale qui ne doit pas être perdue de vue. Les Tribunaux arbitraux mixtes ne fonctionnent pas sur la base d'un compromis étroit conclu entre deux États intéressés, seuls, mais le compromis est un traité plurilatéral, auquel toute une série d'États sont parties contractantes. Il paraît donc inadmissible que deux parmi ces parties, même d'un commun accord et même sur l'invitation du Conseil, imposent à elles seules au Tribunal une règle de droit nouvelle ou même une interprétation du droit existant; le Tribunal fonctionne sur la base du Traité, avec mission d'appliquer le Traité. L'interprétation *applicative* de ce Traité appartient à lui seul; une interprétation *authentique,* faisant loi pour le Tribunal, ne pourrait provenir que du consentement de tous les signataires. Il se pourrait donc très facilement que même si un nouvel arrangement intervenait entre les deux parties au sujet de la compétence du Tribunal

arbitral mixte, celui-ci refusât à ce nouvel arrangement toute force obligatoire à son propre égard, se considérant non pas comme mandataire des deux États plus spécialement intéressés, mais comme mandataire et exécuteur du Traité conclu entre un grand nombre d'États. Une telle attitude trouverait sa justification en tout premier lieu dans des principes généraux, mais aussi, et d'une manière plus formelle, dans les stipulations de l'article 248 du Traité de Trianon, qui défend expressement tout arrangement entre les parties directement intéressées qui serait contraire aux stipulations de la section VIII de la Partie X du Traité, où se trouve aussi l'article 250 dont il s'agit.

La teneur de l'article 248 du Traité de Trianon est la suivante:

"Les questions concernant les ressortissants de l'ancien royaume de Hongrie ainsi que les ressortissants hongrois, leurs droits, *privilèges* et biens, qui ne seraient pas visés, ni dans le présent Traité, ni dans le Traité, qui doit régler certains rapports immédiats entre les États auxquels un territoire de l'ancienne monarchie austro-hongroise a été transféré ou qui sont nés du démembrement det cette monarchie, feront l'objet de conventions speciales entre les États intéressés, y compris la Hongrie, *étant entendu que ces conventions ne pourront, en aucune manière, être en contradiction avec les dispositions du présent Traité.*"

Cela signifie que les parties directement intéressées n'ont pas le droit de passer entre elles des conventions complémentaires contraires aux stipulations de cette section du Traité. Le Tribunal en pourrait déduire qu'il y a là une raison de plus pour que ces stipulations elles-mêmes ne puissent être abrogées directement.

d) Ce que les trois principes des jurisconsultes contiennent, ce n'est pas une interprétation, ce serait une modification du Traité de Trianon, modification unilatérale au détriment de la Hongrie et en tournant l'article 19 du Pacte. Il est notoire, en effet, que c'est l'article 19 du Pacte qui contient les règles pour une procédure ouverte de révision des traités et qui doit être suivi en cas de besoin. Nous avons déjà vu que l'article 11 du Pacte ne peut être employé pour faire passer au Conseil le droit de décision appartenant, d'après le Traité, au Tribunal arbitral mixte. Il est évident qu'il ne peut être employé dans le but non plus de faire tourner l'article 19 du Pacte, pour arriver par une voie de détour à la modification d'un Traité.

Ce fut l'un des principaux arguments que les Représentants hongrois ont déjà opposés, devant le Comité des Trois, aux propositions du

Représentant roumain, auxquelles les principes des juristes ressemblent beaucoup. L'argument, par conséquent, qui valait contre ces propositions, vaut aussi contre les principes des juristes. La correspondance y relative qui a eu lieu devant le Comité des Trois, se trouve ci-annexée (Annexe A). Cette annexion nous paraît d'autant plus nécessaire que cette correspondance a pu échapper à l'attention de plusieurs membres du Conseil.

Si la Hongre consentait à un tel emploi de l'article 11 du Pacte dans le double but de laisser exercer par le Conseil les droits d'un tribunal d'arbitrage et d'imposer la révision d'un Traité, elle se rendrait coupable de la création d'un précédent funeste pour n'importe quel État, au détriment duquel un autre État désirerait obtenir la révision de n'importe quel traité, convention, arrangement ou compromis. Son adversaire n'aurait plus qu'à invoquer l'article 11 du Pacte, en prétendant que la bonne entente était en danger; il pourrait même le faire, quand une cour d'arbitrage se serait déjà prononcée en sa défaveur; il n'aurait, dans ce dernier cas, qu'à alléguer, en même temps, un excès de pouvoir de la part de la cour d'arbitrage dont la décision lui est gênante. La création d'un tel précédent outrepasserait de beaucoup l'importance du litige actuel, et mériterait à juste titre un blâme sévère de la Hongrie de la part de tous les États ayant à cœur l'institution de l'arbitrage, le droit international et l'inviolabilité des conventions.

e) A moins que l'on ne veuille imposer à la Hongrie par une voie détournée l'obligation à consentir à une modification des stipulations du Traité de Trianon, le problème de la compétence des Tribunaux arbitraux mixtes doit et ne peut se résoudre qu'uniquement et exclusivement sur la base du Traité de Trianon lui-même. *Chaque nouveau texte additionnel serait inutile, voire inadmissible. Inutile s'il ne contient rien qui ne serait exprimé déjà dans le Traté, inadmissible et dangereux s'il contient autre chose et même s'il contient la même chose sous une autre forme,* car dans ces derniers cas il risquerait de créer une confusion devant le Tribunal arbitral mixte et d'étouffer par le moyen de cette confusion les procès les plus justes des requérants hongrois.

Un nouveau texte ne serait acceptable que dans le cas où, au lieu d'être la source de nouvelles disputes, il résoudrait définitivement les cas concrets litigieux eux-mêmes. C'est pourquoi les Représentants du Gouvernement hongrois ne se sont pas lassés de répéter les avantages,

à ce point de vue, d'accords passés entre les parties litigieuses elles-mêmes et éventuellement homologués par le Tribunal arbitral mixte. Or, les parties en litige dans ces affaires ne sont pas l'Etat roumain et l'Etat hongrois, mais l'Etat roumain et environ 350 ressortissants hongrois: (non pas surtout des magnats hongrois, pour lesquels la propagande roumaine les voudrait faire passer, mais pour la plupart de petites gens, dont une grande partie même sont des veuves et des orphelins). C'est à eux personnellement et non pas au Gouvernement hongrois que le Traité donne les droits dont il s'agit. C'est pourquoi les Représentants de la Hongrie ont offert, à plusieurs reprises, devant le Comité des Trois tout aussi bien que devant le Conseil des pourparlers entre le Gouvernement roumain et les requérants hongrois, respectivement leur mandataire, pour arriver entre eux à des transactions, englobant toutes les questions pratiques.

Le Ministre des Affaires Etrangères de la Hongrie a même donné devant le Comité des Trois les lignes principales d'une transaction de ce genre que le Gouvernement hongrois serait prêt à recommander à ses ressortissants. Le Comité des Trois n'a pas tenu compte de cette offre, il ne l'a même pas mentionnée dans la partie historique de son rapport.

Néanmoins, le Gouvernement hongrois a tenu à continuer ses tentatives en vue d'une telle solution amiable de l'affaire. A cet effet, il s'est adressé même dans l'intervalle depuis la session du Conseil du mois de septembre directement, par la voie diplomatique, à la Roumanie. Nous avons l'honneur de joindre au présent mémoire copie de la note du Gouvernement hongrois, adressée à ce sujet au Gouvernement roumain (Annexe B). Nous sommes convaincus qu'il en pourrait résulter un règlement définitif et honorable, pour toutes les parties, de l'incident, si la Roumanie voulait se prêter à des pourparlers directs et à une entente sur de telles bases, avec un esprit sincère de conciliation et avec une bonne volonté correspondant à celle dont la Hongrie est animée.

f) C'est un grief à part que, si le Conseil s'arroge le droit, en se basant sur l'art. 11 du Pacte, de rechercher si le Tribunal arbitral mixte a commis ou non un excès de pouvoir—bien qu'il n'y eut aucune stipulation qui lui concède le pouvoir de décider pareille question de droit en Cour d'Appel sur une instance internationale—il impose à la Hongrie, à la place d'une solution juridique, une solution politique.

C'est un grief de plus que cette solution politique, et qualifiée

comme politique tout aussi bien par le Représentant de la Roumanie que par le Rapporteur, est présentée tout de même, en fin de compte, comme une nécessité juridique, résultant, pour les parties en cause, de l'acceptation du Traité de Trianon, ainsi que la dernière phrase du préambule des principes des juristes voudrait la représenter: "principes que l'acceptation du Traité de Trianon a rendus obligatoires pour la Roumanie et la Hongrie."

Pour s'assurer de la justesse d'une telle prétention, le Représentant de la Hongrie au sein du Conseil dans sa session du mois de septembre, a demandé que le Conseil porte éventuellement la question de savoir si les trois principes des juristes résultent vraiment du Traité de Trianon, devant la Cour, pour connaître son avis.

2. Passant maintenant à l'examen détaillé des trois principes des juristes, nous devons faire les observations suivantes:

a) Le traitement différentiel et préjudiciel des ex-ennemis aussi bien que l'absence de leur indemnisation en cas d'expropriation peuvent être un trait caractéristique de la "saisie" ou de la "liquidation" ou pour mieux dire de "toute autre mesure de ce genre" au sens des art. 232 et 250. Mais ni l'un ni l'autre n'en est un trait caractéristique indispensable. Le n° 1 de l'avis des juristes veut éliminer complètement la question de l'indemnité, comme si elle n'existait pas, le n° 2, par contre, fait de la différentialité un trait caractéristique indispensable et décisif de la mesure prohibée. Ces deux thèses sont l'une et l'autre erronées.

On peut admettre—sous réserve de la juridiction obligatoire du Tribunal arbitral mixte—ce qui se trouve exprimé dans le paragraphe n° 1, à savoir que: "l'interdiction de retenir et de liquider ne peut restreindre la liberté d'action de la Roumanie au-delà de ce qu'aurait été cette liberté d'action si les articles 232 et 250 n'avaient point existé." Mais il faut ajouter, d'abord, que tout aussi bien le traitement différentiel que l'expropriation sans indemnité convenable seraient, en tout cas, et par eux-mêmes, contraires au droit international commun, par conséquent la Roumanie n'aurait pas possédé à cet égard, une entière liberté d'action, mêmes si les articles 232 et 250 n'avaient pas existé; ensuite, qu'il n'y a aucun doute que les articles 232 et 250 existent et que, grâce aux larges cadres qu'ils assignent à la notion de la mesure prohibée, l'enlèvement sans indemnité aussi bien que le traitement différentiel sont englobés dans cette notion. Par conséquent,

les actes du genre de ceux que les mesures de la réforme agraire, que la Roumanie a appliqués aux ressortissants hongrois en Transylvanie et qui sont à la fois discriminatoires et constituent des enlèvements de la propriété privée sans indemnité réelle, se trouvent défendus et par le droit international général et par l'article 250 du Traité de Trianon qui renvoie à l'article 232. Ce qui se dégage donc du principe précité, posé sub n° 1, ce n'est pas la liberté d'action de la Roumanie, mais la restriction de sa souveraineté, et cette dernière non seulement d'après le droit international commun, mais aussi d'après les articles 232 et 250 du Traité de Trianon.

C'est cette restriction de la souveraineté de la Roumanie sous ce double rapport qui décide, pour ainsi dire, de tout le problème. S'agissant, en l'espèce, de la compétence du Tribunal arbitral mixte, qui n'embrasse pas les violations du droit international commun, comme telles, mais seulement les "saisies," "liquidations" et autres mesures prohibées, la restriction de la souveraineté de la Roumanie par le droit international commun passe, au point de vue de la compétence du Tribunal arbitral mixte, au second plan, et c'est sa restriction par les articles 232 et 250 qui se place au premier. Mais, ce qui est le plus important, c'est que cette dernière restriction porte également sur le traitement différentiel et sur le traitement gravement dommageable qui consiste dans l'enlèvement de la propriété sans indemnité, et non seulement sur le traitement différentiel, comme le texte des juristes le paraît supposer. A la vérité, il serait étrange et contradictoire que même un traitement légèrement différentiel fût une mesure prohibée, mais que l'enlèvement, sans aucune indemnité, de la propriété, de la fortune entière, même dans sa totalité, restassent des actes licites. Comme cependant les deux premiers principes des juristes en connexité l'un avec l'autre semblent commader ces solutions contradictoires, il faut examiner cette thèse de plus près.

La différentialité n'est pas un élément indispensable de la notion des "mesures" au sens technique du terme ni en vertu de l'article 250, ni en vertu de l'article 232, ni en vertu de l'annexe à ce dernier article, bien que surtout dans l'annexe mentionnée, pareils détails, se rapportant à la notion des "mesures," se trouvent réglés en abondance. Le terme "différentiel" ou un de ses synonymes ne se trouve *pas une seule fois* dans les longs textes invoqués. Pourtant, ce terme n'est pas inconnu

du Traité. Le Traité s'en sert, à d'autres endroits, quand il veut en faire l'élément indispensable de ses dispositions, comme par exemple dans l'article 233, l'art. 211, etc. Les phrases dans les textes correspondants de l'annexe à l'art. 232, comme: "prises à l'égard de biens ennemis" n'expriment pas l'exclusivité et par celà l'indispensabilité du traitement différentiel, mais elles déterminent tout simplement l'objet que la mesure doit frapper. La jurisprudence des Tribunaux arbitraux mixtes est constante et unanime sur ce point. Le problème a été résolu dès le commencement de l'activité des Tribunaux arbitraux mixtes.

La Cour permanente de Justice à la Haye a eu, elle aussi, à s'occuper de ce problème, quand on soutint devant elle que la différentialité était un trait caractéristique indispensable de la liquidation. La Cour permanente s'est prononcée très nettement dans le sens contraire à cette prétention et elle a confirmé la jurisprudence des Tribunaux arbitraux mixtes. Voici dans quels termes clairs et décisifs la Cour s'exprime: "Même s'il était prouvé—question que la Cour ne croit pas nécessaire d'examiner—qu'en fait, la loi s'applique également à des ressortissants polonais et allemands, il ne s'ensuivrait aucunement que les suppressions de droits privés qu'elle effectue à l'égard des ressortissants allemands ne soient pas contraires au titre III de la Convention de Genève. L'expropriation sans indemnité est certainement contraire au titre III de la Convention; or, *une mesure défendue par la Convention ne saurait devenir légitime au regard de cet instrument du fait que l'Etat l'applique aussi à ses propres ressortissants.*" (Arrêt 7, page 33).

Il est notoire que l'article 6 du Titre III de la Convention de Genève, dont il s'agit dans l'arrêt 7 de la Cour, est la réplique de l'article 250 du Traité de Trianon, que l'Allemagne, qui n'est pas bénéficiaire de pareil article dans le Traité de Versailles, a tenu à faire entrer dans la Convention de Genève pour protéger contre les liquidations de la Pologne les biens allemands au moins en Haute-Silésie plébiscitaire. L'analogie, sinon l'identité des cas, est donc, on ne peut plus parfaite.

Même les consultants des Etats adverses, et précisément en ce qui concerne les mesures prises sous la forme de la réforme agraire, n'osent s'exprimer autrement au sujet de la différentialité que dans des termes pleins de réserves: "Ce n'est pas à dire que le caractère différentiel soit absolument sans importance pour déterminer la signification de la mesure de liquidation au sens des articles 232 et 250 du Traité de Trianon. Le caractère différentiel ou non différentiel de la mesure

est une indication importante, surtout pour les mesures d'expropriation forcée prises immédiatement après la guerre, pour déterminer si elles ont ou non un lien étroit de connexité avec la guerre. La généralité de la mesure, son application aux nationaux et aux étrangers suivant les mêmes règles et avec les même garanties, sont des éléments très précieux de solution. Mais, comme nous l'avons vu par les exemples cités plus haut, ils ne peuvent pas, à eux seuls, donner la solution du problème." (Consultation sur la compétence du Tribunal arbitral mixte à l'égard de la réforme agraire tchécoslovaque, par MM. Jules Basdevant, Gaston Jèze et Nicolas Politis, Professeurs et Professeur honoraire à la Faculté de Droit de Paris).

En présence d'une pareille jurisprudence unanime des juridictions internationales et de ces opinions pleines de réserves dans le camp adverse lui-même, on peut conclure qu'exiger du Gouvernement hongrois de se ranger du côté des juristes du Comité des Trois n'est nullement justifié.

Alors que l'expression de la différentialité ne se trouve pas une seule fois dans le texte des articles 250, 232 et de l'annexe à l'article 232, l'indemnité est une question constamment visée dans ces textes. Cette expression: "indemnité" se trouve maintes fois dans l'article 232, et il s'y trouve *treize* dispositions qui visent directement l'indemnité due de la part d'un des Etats, toutes les fois même qu'il s'agit de liquidation. Cela est dû au fait que les Traités sont basés sur un droit international qui respecte et fait respecter le droit de propriété des étrangers et celui des ex-ennemis eux-mêmes. Jamais l'enlèvement de la propriété privée sans indemnité convenable n'est admis par les Traités de Paix ayant mis fin à la guerre mondiale.

On n'a pas à quitter le terrain du Traité pour retrouver le principe du respect de la propriété privée sous la forme de l'obligation d'indemniser la victime en cas de violation de sa propriété privée. Dans les Traités, tout aussi bien que dans le droit international coutumier, l'inviolabilité de la propriété privée est un véritable *principe de droit* et non seulement un principe vague d'équité dont les grandes puissances seules pourraient user à l'égard des petits Etats dans des réclamations diplomatiques.

La question de l'existence ou de l'absence d'une indemnité est une partie intégrante du problème de la liquidation ou de la mesure prohibée. Nombre d'actes qui ne seraient pas des mesures prohibées en eux-mêmes

deviennent prohibés parce que, à défaut d'indemnité suffisante, ces actes cessent d'être des expropriations du droit commun.

C'est là un principe très important. Aussi fut-il affirmé et appliqué par des sentences des Tribunaux arbitraux mixtes contre les puissances centrales. Ces sentences ont constaté l'existence de la mesure prohibée là, où, s'il y avait une indemnité suffisante, il ne se serait agi que d'un acte inoffensif du droit commun. Voir l'arrêt du Tribunal arbitral mixte germano-belge du 20 juillet 1923 dans l'affaire Marbes-le-Château contre Draht-Aktien-Gesellschaft.

Le même principe de l'importance de la question de l'indemnité au point de vue de la constatation de l'existence d'une mesure prohibée découle aussi du même texte de l'arrêt n° 7 de la Cour permanente de Justice internationale qui fut déjà cité ci-haut à un autre effet: "L'expropriation sans indemnité est *certainement* contraire au Titre III de la Convention de Genève."

Comme d'aucuns voulaient en douter encore, la Cour a cru nécessaire de se répéter dans son arrêt n° 8, avec plus d'insistence encore, si possible: "Si, à l'encontre de ce que la Cour vient maintenant d'exposer, il était allégué que les mesures prises par le Gouvernement polonais à l'égard des Oberschlesische et Bayerische ne constituaient pas une expropriation au sens du titre III de la Convention de Genève, la Cour devrait répéter ce qu'elle a déjà eu l'occasion de dire non seulement dans son arrêt n° 7, mais également dans le présent arrêt, savoir que, *si l'expropriation moyennant indemnité est prohibée par ledit titre, à plus forte raison en est-il ainsi d'une prise de possession sans compensation aux intéressés*" (Arrêt n° 8, page 31).

La contradiction est manifeste entre la jurisprudence de ces hautes jurisdictions et la phrase suivante des juristes insérée à la fin du principe n° 1: *"La question d'indemnité,* quelle que puisse être son importance à d'autres points de vue, *n'entre pas ici en ligne de compte."* "Ici" signifie évidemment pour l'établissement de la liquidation. Alors, c'est une grave erreur que les textes de la Haute Cour permanente de Justice internationale font clairement ressortir.

On peut se rendre compte en même temps que le Représentant de la Roumanie a émis une phrase bien hasardeuse quand il a avancé: "Permettez-moi de vous dire que notre Rapporteur, Sir Austen Chamberlain, vous a dit que le haute compétence des juristes avait puisé

ses informations dans le jurisprudence de la Cour de la Haye." La vérité nous semble être exactement le contraire.

"Mais est-il donc possible que le Conseil recommande aux Etats Membres de la Société des Nations l'acceptation de principes diamétralement opposés à ce qui a été prononcé comme droit incontestable par des Tribunaux internationaux institués par les Traités et par la Cour permanente de Justice internationale elle-même?"

Cette question n'a pas été posée par nous-mêmes, mais par quelqu'un dont la haute vocation est de rendre la justice, en occupant la plus haute position judiciaire dans un des plus grands Empires représentés au Conseil.

Il faut réfléchir. Est-ce qu'il serait vraiment possible que la question d'indemnité n'eût aucune importance du point de vue de la liquidation dans les territoires transférés, dans lesquels les Traités ont voulu protéger les biens des ressortissants hongrois? Serait-il possible que les ressortissants hongrois restent sans indemnité aucune dans ces territoires, tandis que dans les anciens territoires des Etats voisins victorieux, même liquidés, ils reçoivent forcément, et dans tous les cas, une indemnité convenable? (Voir l'article 232, litt. j. du Traité de Trianon). Et s'il s'agit de nouveaux Etats ou d'Etats qui ne participent pas aux réparations, l'indemnité convenable doit être payée par les Etats liquidateurs sur tout leur territoire avec possibilité d'un recours aux Tribunaux arbitraux mixtes, si l'indemnité est jugée insuffisante. (Voir l'article 232, litt.i du Traité de Trianon). Il est impossible que les personnes que les Traités ont voulu plus protéger, puissent se trouver en fait moins protégées que les sacrifiées. Ou bien pensons à la contradiction qu'il y aurait entre la situation des liquidés et des personnes frappées seulement par des mesures que l'on veut faire passer pour des mesures de paix, telles que la réforme agraire. Les liquidés auraient une indemnité pour leurs biens liquidés, les soi-disant non liquidés, mais frappés seulement par une mesure soi-disant pacifique, la réforme agraire, n'en auraient pas. Ce seraient des contradictions inexplicables. Elles laissent entrevoir l'erreur qui vicie la manière de voir des adversaires et des juristes du Comité des Trois.

L'acceptation du principe que l'indemnité n'a aucune importance au point de vue de la liquidation, en connexité avec l'exigence, par contre, comme élément, prétendûment indispensable, de la différentialité, pour déterminer le caractère de la liquidation, impliquerait

non seulement une violation manifeste des principes qui sont à la base des stipulations des Traités au sujet de la liquidation, respectivement de la propriété privée, elle impliquerait encore un complet désaveu du droit international commun des Etats qui forment la communauté internationale actuelle.

Toutes les fois qu'il y a violation de la propriété privée, qu'elle se fasse systématiquement ou sporadiquement, à l'encontre du droit interne ou en conformité avec lui à la suite d'une législation ordinaire ou d'une révolution, "pacifique" ou violente, le droit international général n'en exige pas moins réparation en faveur des étrangers, nonobstant le défaut de réparation en faveur des nationaux par suite du fait que le droit interne s'est momentanément écarté des principes géneraux du droit. Mais la protection restée intacte et exercée par le droit international en faveur des étrangers n'est pas pour cela un privilége en faveur des étrangers, bien qu'elle crée une différence entre l'étranger et le national. C'est l'état juridique normal de l'étranger que le droit international—contre lequel on ne peut pas faire révolution—continue à leur assurer. On ne peut pas présenter la situation exceptionnelle et anormale dans laquelle se trouvent les nationaux comme un état normal, afin de pouvoir ensuite qualifier de privilège au profit des étrangers l'état normal véritable dont ceux-ci se réclament. Parler, dans le cas des requérants hongrois, d'une aspiration à des privilèges, c'est abuser des mots et créer un mirage.

L'attitude d'un Etat à l'égard de ses propres nationaux ne saurait jamais servir de prétexte et de moyen pour un Etat de changer ses obligations internationales à l'égard des étrangers. Ce n'est pas le droit international qui dépend d'une attitude quelconque du droit interne, c'est le droit interne qui doit se tenir dans les cadres tracés par le droit international. C'est le dernier qui doit être le plus fort; autrement il n'existerait pas, car il serait à la merci du droit interne, maniable à leur gré par les Etats, prétendûment obligés et liés par le droit international. C'est pourquoi, disait M. Bayard, Secrétaire d'Etat des Etats-Unis d'Amérique, en 1887: "If a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government can not appeal to its municipal

regulations as an answer to demands for the fulfillment of international duties." (Cité chez Borchard: Diplomatic Protection of Citizens Abroad, page 106). C'est pourquoi, dit le même Borchard, parlant précisément de l'absurdité pour un Etat d'alléguer le traitement égal dans le but de se défaire d'une obligation internationale: "The alien is not bound to accept the treatment accorded to nationals if such treatment accorded to nationals is in violation of the ordinary principles of civilized justice, and notwithstanding the fact that the national has no immediate remedy against the injustice." Dans le même sens, A. de Lapradelle et N. Politis écrivent dans leur Recueil des arbitrages internationaux, II p. 278: "Dire que l'étranger ne saurait être mieux traité que le national, c'est une formule inexacte, car le traitement du national est déterminé par le droit interne, tandis que le traitement de l'étranger est déterminé par le droit international, et le contenu des règles du second, quoique généralement plus restreint, peut, sur certains points, être exceptionnellement plus étendu que le contenu des règles du premier."

Aucun Etat n'a encore abandonné son droit d'exiger des autres Etats pour ses ressortissants le respect de leur propriété privée, de quelque façon que l'Etat dont s'agit traite la propriété privée de ses propres ressortissants. Il est facile de citer des exemples, tellement les cas sont multiples. En voici quelques-uns des plus récents:

La Grande-Bretagne se réclame de ce principe dans l'affaire de l'expropriation des congrégations au Portugal, soumise à la Cour permanente d'arbitrage, en argumentant de la façon suivante: "Respect of property, respect of acquired rights, these are the legal principles of all civilised countries. It is upon the security which they assure and confidence they inspire that the relations entertained by nations with each other are based."

L'arrêt du 13 octobre 1922 de la Cour permanente international d'arbitrage a fait valoir cette règle en faveur de la Norvège contre les Etats-Unis de l'Amérique du Nord: "Whether the action of the United States was lawful or not, *just compensation is due* to the claimants under the municipal law of the United States, *as well as under the international law, based upon the respect for private property.*"

Les États-Unis de l'Amérique du Nord font valoir, en ce moment, la même règle contre le Mixique et le Mexique ne met pas en doute son existence. C'est pour cette raison que la note du Secrétaire d'État des

Etats-Unis, addressée au Ministre des Affaires Étrangères de la République Mexicaine, en date du 31 juillet 1926, établit avec la plus grande assurance: "The correspondence discloses little, if any, variation or difference of opinion with respect to the statement of certain principles which we have agreed lie at the basis of our consideration of the matters. Let me enumerate these fundamental ideas or principles: First: Lawfully vested rights of property of every description are to be respected and preserved *in conformity with the recognised principles of international law and of equity.*"

Rien n'est changé à cette règle, même dans le cas où la propriété privée des étrangers est violée par suite d'un changement révolutionnaire du système de la propriété. C'est pour cette raison que M. Poincaré, Président du Conseil de France, s'exprimait ainsi dans un discours au Parlement le 2 juin 1922, dans l'intervalle de la Conférence de Gênes et de celle de la Haye, au sujet des biens immobiliers des ressortissants français expropriés en Russie, précisément à la suite d'une révolution: "En ce qui concerne les biens privés de nos nationaux expropriés, si l'effort persévérant de la délégation française doit parvenir à en faire admettre la restitution, il faut cependant prévoir le cas où cette restitution serait un fait impossible. Des réformes comme celle de la redistribution des terres, conséquence de la réforme agraire, sont de celles sur lesquelles il sera peut-être difficile de revenir. Dans ce cas, au lieu de la restitution de la propriété, les Soviets proposeraient un système d'indemnisation des propriétaires dépossédés. Il faudra veiller à ce que *ce système soit sincère et aboutisse à des indemnités complètes*" (*Temps* du 3 juin 1922).

La Hongrie n'abdiquera pas non plus les droits de ses ressortissants, *elle saurait d'autant moins le faire qu'elle ne les réclame pas, dans l'espèce, en vertu d'une règle du droit international coutumier, mais en vertu d'une, sinon de plusieurs stipulations conventionnelles inscrites dans les Traités.*

En présence des graves menaces auxquelles la propriété privée des ex-ennemis sur les territoires détachés de la monarchie austro-hongroise étaient exposés, leur protection a fait, en effet, l'objet des soins de plusieurs clauses du Traité de Trianon lui-même; non seulement à l'article 250, mais aussi à l'article 63. Ce dernier article est très catégorique: "Elles (les personnes ayant exercé leur droit d'option) seront libres de *conserver* les biens immobiliers qu'elles possèdent sur le terri-

toire de l'autre Etat." En englais: "They will be *entitled* to *retain* their immovable property." Si, malgré ces termes catégoriques, on trouve des arguments pour justifier une situation telle que les optants doivent quitter leur sol natal et qu'en même temps toute propriété leur est enlevée sans aucune indemnité, il y a des raisons graves à supposer que ces arguments ne sont pas en conformité avec ces stipulations.

Le Traité conclu entre les principales Puissances Alliées et Associées et la Roumanie, le 9 décembre 1919, se préoccupe également du danger, auquel la propriété des optants serait exposée en territoires transférés. Son article 3, alinéa 3, répète la même règle qui se trouve dans l'article 63 du Traité de Trianon. Le préambule de ce Traité prévoit même la possibilité de tentatives faites pour déjouer ces clauses de protection par une législation interne et tâche de parer d'avance à pareilles éventualités, en disposant on ne peut plus clairement: "Considérant qu'en vertu des traités auxquels les principales Puissance alliées et associées ont apposé leur signature, de larges accroissements territoriaux sont ou seront obtenus par le Royaume de Roumaine . . . (L'article 1), la Roumaine s'engage à ce que les stipulations contenues dans les articles 2 à 8 du présent Chapitre—par conséquent aussi dans l'article 3, alinéa 3,—soient reconnues comme loi fondamentale *à ce qu'aucune loi, aucun règlement ni aucune action officielle ne soient en contradiction ou en opposition avec les stipulations et à ce qu'aucune loi, aucun règlement ni aucune action officielle ne prévalent contre elles.*" Comme on voit, les Traités ont clairement prévu le cas où ces droits viendraient à être violés par une législation interne contraire au principe de la protection. Ils prennent leurs précautions: *la législation interne doit déférer aux préceptes du droit international.*

Du reste, le principe de l'inviolabilité de la propriété privée n'est pas professé seulement par quelques articles des Traités de paix; il est à la base de tous leurs Chapitres et Sections relatifs aux biens, droits et intérêts des ex-ennemis. Nulle part, dans les Traités, ne se trouve une violation de ce principe, au contraire, partout où l'on regarde, on trouve sa confirmation réitérée et multipliée.

En dehors de l'article 250, il y a, par exemple, aussi l'article 240 sur lequel les requérants hongrois auraient pu et quelques requérents ont même effectivement basé leurs requêtes devant le Tribunal arbitral mixte. Cet article comporte que, dans tous les cas où les jugements des Tribunaux internes seraient contraires aux dispositions des Sections

respectives du Traité, le particulier qui "aura subi, de cette manière, un préjudice, aura droit à une *réparation* qui sera déterminée par le Tribunal arbitral mixte." Encore la *réparation,* c'est-à-dire *l'indemnité!* Elle entre donc grandement en ligne de compte quand nous nous trouvons en matière de liquidation.

L'expropriation régulière des biens immobiliers aux fins d'une réforme agraire n'est pas, certes, contraire aux dispositions des Sections indiquées du Traité, mais leur enlèvement *sans indemnité dans n'importe quel but* le devient immédiatement.

De sorte que l'absence d'indemnité devient pratiquement le nœud de la question dans toutes ces affaires!

On voit combien il est contraire à l'esprit des Traités de tâcher de faire accepter comme un principe résultant du Traité de Trianon, ainsi que le veut le text des juristes, l'idée que la question de l'indemnité n'entrerait pas en ligne de compte pour la solution, précisément du problème d'un enlèvement sans indemnité de la propriété à ceux, en faveur desquels le Traité stipule qu'ils peuvent *conserver* leurs biens immobiliers et que, s'ils leur ont été enlevés, ces biens seront *restitués.*

Il est doublement contradictoire de se livrer à une telle tentative lorsqu'on fait état de vouloir résoudre complètement et définitivement le différend en souffrance entre les deux États—comme la partie historique du rapport le constate—depuis quatre ans.

On ne peut pas dire en pareil cas que "la question d'indemnité, *quelle que puisse être son importance à d'autres points de vue,* n'entre pas ici en ligne de compte." C'est avouer que la solution n'est ni complète ni définitive.

Est-ce vraiment que la question d'indemnité ne saurait jamais entrer en ligne de compte,—que l'on recherche la solution de l'affaire soit en vertu de l'article 250, soit en vertu de l'article 63, soit en vertu de l'article 3 du Traité du 9 décembre, soit en vertu du droit international général, soit même en vertu de l'article 11 du Pacte, qui vise à établir des rapports de bon voisinage entre les deux Etats en cause?

Comment le Gouvernement hongrois pourrait-il abdiquer en faveur d'un tel semblant de solution à lui recommandée dans le rapport, les droits de ses ressortissants tant de fois garantis dans les Traités et faire, en même temps, acte de foi en faveur d'un nouveau droit international général qui n'est pas admis par la communauté internationale des États?

Car, la thèse que nous invoquons, n'est pas seulement celle des Traités, mais, comme nous le prouvions en citant des textes, elle appartient aussi au droit international général. Là, elle est même de très ancienne date.

Elle remonte jusqu'à *Vattel*. *Vattel* dit déjà en 1758 dans son *Droit des gens,* livre II, chapitre 7, § 81, comme s'il parlait de l'incident roumano-hongrois: "Il dépend de chaque société politique d'établir chez elle la communauté des biens, ainsi que l'a fait Campanella dans sa république du soleil. Les autres ne s'enquièrent point de ce qu'elle fait à cet égard; ses règlements domestiques ne changent rien au droit envers les étrangers." *Fiore* énumère les droits internationaux des individus, en y comprenant: le droit à la liberté, le droit à la *propriété,* le droit au culte religieux. Le droit international codifié, traduction Antoine, Paris, 1911, nos 624 et suivants; *Martens* compte au nombre des droits imprescriptibles de l'homme celui de vivre, celui d'être respecté dans sa personne, sa vie, son honneur, sa santé, *ses biens;* de même *Oppenheim, International law,* 3e éd. vol. I, § 320; *Calvo, Droit international,* liv. XV, § 1276-1278; *Clunet,* dans une célèbre *Consultation pour les sociétés étrangères d'assurances sur la vie en Italie; Anzilotti, Asser. de Bar, Gabba, Holland, Lammasch, Lyon-Caen, Roguin, Rollin* ont adhéré à cette consultation; *Paul Fauchille, Traité de droit international public,* Paris, Rousseau, 1922, Tome Ier, première partie, p. 934: "Si beaucoup pensent qu'un État, en organisant son gouvernement intérieur, peut, sans provoquer une intervention de la part des autres États, enlever à ses nationaux des *droits qui sont la base de la civilisation moderne, par exemple le droit à la propriété,* la plupart, au demeurant, estiment qu'il ne saurait agir de la sorte vis-à-vis des étrangers sur son territoire *sans soulever les réclamations légitimes* de l'État auquel ils appartiennent."

Verdross, Zur konfiskation ausländischen privateigentums nach Friedensvölkerrecht, Zeitschrift für öffentliches Recht, 1924; *P. Fachiri, Expropriation and international law,* Year Book of international law, 1925; Hugh *Bellot, The protection of private property,* Revue de droit international, Genève, 1926, etc., etc. . . .

L'International Law Association a pris position dans cette question à sa réunion du mois d'août 1926, tenue à Vienne, en pleine conformité avec les principes professés par la doctrine.

La pratique diplomatique, elle aussi, est conforme, les exemples

abondent: affaire du Reverend Jonas King, expropriation sans indemnité, entre les États-Unis et la Grèce, Moore, Digest of international law, I. p. 262-264; affaire Sauvage, entre les États-Unis et le Salvador, Recueil des arbitrages internationaux, II. p. XII, etc., etc. . . .

La Russie des Soviets elle-même s'est vue contrainte de reconnaître ce principe, quand elle a dû entrer en contact avec les États qui forment la communauté internationale juridique actuelle? Au traité de Brest-Litowsk, traité additionnel concernant les rapports financiers, etc., du 27 août 1918, art. 11, il est dit que "les biens des ressortissants allemands en Russie ne seront expropriés que . . . si le propriétaire est indemnisé immédiatement au comptant: (Strupp, Documents pour servir à l'histoire du droit des gens, III, p. 113). Et, plus tard, au traité de Rapallo, l'Allemagne ne renonce, pour le passé à l'application de ce principe qu'au cas où la Russie n'indemniserait pas les ressortissants des tierces puissances. En 1922, aux Conférences de Gênes et de La Haye, les puissances poursuivent la reconnaissance, de la part de la Russie, de ce principe, sous la réserve duquel les relations diplomatiques, plus tard, sont reprises avec cette puissance.

John Bassett *Moore* dit dans *A Digest of international law*. t. V., p. 5, Aliens' Property Rights: "There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of a country in friendship with their own to the protection of its sovereign by all the efforts in his power."

La jurisprudence internationale s'est, d'une manière constante, également prononcée dans le même sens: affaire du chemin de fer du Delagoa, Sentence finale, Berne, 1900; affaire des Congrégations religieuses au Portugal, Cour permanente d'arbitrage de la Haye 1920; affaire des vaisseaux norvégiens, Cour permanente d'arbitrage de la Haye, American journal of international law, avril 1921, p. 362-383; arrêt 7 et arrêt 8 de la Cour permanente de Justice internationale.

Ce que nous avons voulu démontrer, c'est que *la doctrine, la pratique diplomatique et la jurisprudence internationale sont toutes les trois décidément de notre côté.* Ce sont des appuis qui n'ont pas été recherchés par le Gouvernement hongrois pendant le combat, mais qui sont les plus spontanés que l'on puisse s'imaginer, puisqu'ils sont d'une date où une affaire roumano-hongroise n'existait même pas.

Plus spécialement, la thèse que la différentialité n'est pas l'essentiel d'une mesure tombant sous le coup des stipulations de l'article 232 du

Traité de Trianon, mais qu'une mesure qui inflige un grave dommage aux ex-ennemis, bien qu'elle s'étende aussi aux nationaux, peut être contraire à l'article 232, a été soutenue implicitement par les principales Puissances alliées elles-mêmes, et précisément à l'égard de la Hongrie, à l'occasion de l'estampillage, par cet Etat, des billets de banque austro-hongrois, opération qui devait avoir pour conséquence la conversion de la valeur de la moitié des billets estampillés en emprunt forcé. Les principales Puissances Alliées n'ont pas manqué alors de protester contre une telle mesure auprès du Gouvernement hongrois en faveur de leurs ressortissants, en invoquant diverses stipulations de l'article 232 du Traité de Trianon, bien que la mesure de l'estampillage se trouvât dépourvue de tout caractère différentiel. Les notes introductives des échanges de vue sont communiquées en annexe (Annexe C.) (La limite de temps qui figure dans les notes n'a, bien entendu, rien à voir dans la question de la différentialité).

Du reste, la Hongrie s'est toujours conformée sur ce point également à ses obligations internationales et elle n'a pas hésité à accorder un traitement préférentiel aux étrangers par rapport à ses nationaux, quand telle a été l'exigence du droit international. Tel a été le cas, par exemple, lorsqu'elle a, elle-même, réalisé une réforme agraire. Dans l'exécution de cette réforme, elle a considéré comme son devoir de respecter pleinement les droits reconnus aux étrangers par le droit international commun, ainsi qu'aux Alliés par les articles 232 et 233 du Traité de Trianon, sans tenir compte du fait que ses propres nationaux jouissaient, d'après la loi interne, de droits beaucoup moins étendus. De même, quand il s'est agi d'établir en Hongrie un impôt extraordinaire sur le capital, la loi qui l'a créé, (loi XV de 1921), disposa dans son article 2, litt. i.que les étrangers ne seraient pas soumis à cet impôt.

D'ailleurs, la Roumanie elle-même paye à un taux plus élevé ses créanciers étrangers que les porteurs nationaux de ses dettes publiques, par respect de la même règle du droit international général.

C'est en se prévalant du même principe du droit international général que la Grande-Bretagne et la France ont exigé et obtenu de la même Roumanie, que les ressortissants anglais et français, en Bessarabie, reçoivent une pleine indemnité pour les propriété à eux enlevées aux fins de la réforme agraire.

Les mêmes Puissances ont également exigé en Grèce pour leurs ressortissants un traitement préférentiel en matière d'indemnité à payer

pour les immeubles expropriés aux fins d'établissement des réfugiés.

Elles exigent le même traitement conforme au droit international en faveur de leurs ressortissants en Russie et au Mexique, comme ailleurs aussi, ainsi, par exemple, dans les États Baltes, à différentes occasions, souvent quand il s'agit précisément de réformes agraires.

Il est pour le moins étonnant que les mêmes Puissances qui procèdent, ainsi, lorsqu'il s'agit de leurs ressortissants, nous recommandent l'acceptation d'un principe contraire.

b) Les juristes ont introduit dans leurs principes détaillés sous le n° 2 ces mots "comme tels" pour indiquer que la mesure prohibée, si elle veut rester t'elle doit viser spécialement les bien hongrois. Le texte imprimé officiel du rapport le marque même en italique. Cette expression veut indiquer qu'il ne suffit pas, pour qu'un acte soit une mesure prohibée„ qu'il frappe objectivement des biens ex-ennemis; il ne suffit même pas qu'il soit différentiel, il faut encore que l'intention elle-même soit de les frapper parce que biens ex-ennemis. Ceux qui avaient intérêt à soutenir cette thèse, en ont tenté la définition par les mots: "Expropriation pour cause de nationalité ex-ennemie." La Cour permanente de justice a eu déjà à s'occuper de pareille prétention dans son arrêt, 7, mais elle en fit rapidement justice. En effet, nous ne trouvons cette expression "comme tels" nulle part dans les Traités. Du reste, cette expression ne se trouve pas même bien placée dans le § 2 du texte des juristes, logiquement elle aurait dû être inscrite dans le § 3, qui traite plus spécialement de la recherche des intentions. Dans le principe n° 3, les juristes estiment, en effet, qu'il ne suffit pas que le requérant hongrois prouve que son bien a été traité différentiellement par rapport aux biens des Roumains; il doit encore prouver que l'intention de l'Etat roumain a été de la frapper parce que hongrois. Mais l'exigence d'une pareille preuve ferait des Traités de Paix un Code pénal et des Tribunaux arbitraux mixtes de véritables cours criminelles qui seraient tenues de scruter les intentions, au lieu de se contenter, d'après les principes ayant cours dans le droit civil et dans les domaines voisins, des effets extérieurs. Il s'agit ici, pour une large part, de lois. Or, il est notoire que le droit constitutionnel tend à donner une vie indépendante aux lois, en faisant abstraction même des exposés des motifs présentés par les promoteurs des lois, en tenant compte du fait que le vote de la majorité du parlement a pu se baser sur des motifs très différents. En

tout cas, il serait extrêmement difficile, sinon impossible de prouver, avec, une certitude juridique, les intentions d'un corps collectif et surtout d'un Etat. Dans lequel de ses organes devrait-on rechercher le siège de ses intentions? Puisque le texte des Traités n'exige pas expressément des requérants une preuve de ce genre, la nécessité de cette preuve ne saurait être présumée. Exiger cette preuve dans chaque cas, et *in limine litis,* avant de pouvoir commencer le procès, équivaudrait à étouffer peut-être chaque instance dès le début en accumulant des difficultés pratiquement presque insurmontables d'une preuve en soi inutile. *On ne saurait exiger cette preuve que là où il n'y aurait pas d'autres indications de l'existence d'une mesure prohibée.* Mais rien n'est plus injuste et vexatoire que de vouloir exiger des requérants, qui peuvent prouver le défaut d'indemnité—ce qui en lui-même devrait suffire—d'abord qu'ils prouvent en outre, que la mesure était différentielle—*ce qu'ils pourraint prouver aussi, s'il le fallait*—et par surcroît encore le fait que l'auteur poursuivait intentionnellement un but de différentialité.

Il est possible qu'en pratique la preuve de l'intention ne pourrait jamais être rapportée puisque l'Etat roumain qui, comme Etat, dispose sur son territoire de tous les moyens de la puissance publique, réussirait toujours à faire la preuve inverse. Un exemple pratique démontre très clairement ces difficultés: les requérants hongrois essayeraient en vain de prouver que leurs biens leur furent pris en tant que biens d'un ressortissant hongrois, l'Etat roumain pourrait éventuellement prouver, des textes en main, qu'ils ont été pris, non pas comme biens d'un "ressortissant hongrois," mais comme biens d'un "absentéiste."

Et cependant cette question de l'absentéisme est celle où éclate le plus clairement la différentialité essentielle et effective de la législation agraire roumaine; car le loi agraire pour la Transylvanie est conçue en termes tels qu'en fait, d'abord, seuls ou presque seuls sont frappés les ressortissants hongrois, et qu'ensuite, presque tous les propriétaires hongrois sont atteints,—alors que la propriété roumaine échappe à peu près entièrement à l'application des dispositions légales sur l'absentéisme en Transylvanie.

A la vérité, l'acceptation par le Gouvernement hongrois du principe n° 3, exigeant dans tous les cas, même inutilement, la preuve de l'intention, obligerait le Gouvernement hongrois à avouer à ses ressortissants: j'ai obtenu pour vous un juge, mais à la condition qu'il ne puisse pas juger.

3. En dehors de graves objections de principes contre les thèses des juristes, il y a des inconvénients pratiques inhérents à leur acceptation.

Si les principes des juristes, contenant tous des solutions de questions de fond, étaient acceptés comme de nouvelles règles pour la compétence, ils rendraient nécessaires le recommencement de tous les procès dits agraires dès le premier mémoire écrit, ayant trait à la procédure incidente sur la compétence. Et, pour le pouvoir faire, on devrait modifier même le règlement de procédure du Tribunal, en ce qui concerne les nouveaux délais, dans lesquels les nouveaux mémoires devraient être déposés, respectivement une nouvelle procédure écrite sur l'incident de la compétence devrait être commencée. Si, en de telles circonstances, la Roumanie met pareille lenteur à exécuter les nouvelles formalités requises que celle dont elle a fait preuve jusqu'à présent en tout ce qui concernait la marche du Tribunal arbitral mixte, l'acceptation du texte des juristes impliquerait aussi que dans les 330 affaires environ, dites agraires, qui restent encore en suspens en dehors des 22 déjà jugées, en ce qui concerne la question de compétence, le Tribunal arbitral mixte roumano-hongrois ne pourrait commencer à ouvrir les nouveaux débats oraux, rien que sur la question de compétence, *avant trois ans*. Encore, dans ce retard n'est pas compris celui qui serait causé par les preuves interminables et non requises aux termes d'une juste interprétation du Traité, que les requérants hongrois seraient obligés à administrer après les débats oraux, dans une procédure spéciale des preuves, en vertu des trois principes des juristes, pleins de nouvelles exigences à leur égard en ce qui concerne des circonstances accumulées qui exigeraient des preuves, à leur avis, *in limine litis*. Nous avons déjà dit que ces preuves seraient superflues, car d'après les trois principes, le requérant devrait prouver l'existence de la mesure prohibée pour ainsi dire d'une manière multipliée. Le défaut d'indemnité ne suffisant pas d'après ces principes, il devrait prouver encore la différentialité, et même celle-ci ne suffisant pas, il devrait prouver aussi l'intention spéciale de l'Etat roumain, et tout celà pour obtenir d'abord la compétence pour pouvoir entrer dans le procès. Ce serait une procédure extrêmement coûteuse et vexatoire, sous le poids de laquelle les procès des requérants hongrois seraient littéralement écrasés. *Il ne saurait être question de tels procès que dans le cas où la réforme agraire de la Roumanie reconnaîtrait l'indemnisation complète des expropriés et*

qu'il s'agirait de découvrir des mesures prohibées cachées même sous une telle réforme. Mais la situation est tout autre, une fois que la réforme agraire roumaine a cru pouvoir choisir la voie d'une expropriation sans indemnité, aussi et surtout au détriment des races vaincues dans la grande guerre, des territoires desquelles elle fut enrichie.

Au regard des nouveaux atermoiements considérables ci-haut mentionnés, voire de l'écrasement total des procès, l'argument, tiré de la longueur de la procédure devant la Haute Cour permanente de Justice internationale, que le Rapporteur a pu trouver seulement pour approuver l'attitude de la Roumanie qui ne veut pas accepter d'aller devant la Cour pour faire décider par celle-ci les questions de principe, perd, à la vérité, toute sa valeur. Jamais encore on n'a eu de raison de se plaindre des lenteurs de la Haute Cour permanente de Justice Internationale.

En résumé, nous sommes convaincus que le droit est de notre côté, mais, en tout cas, nous soutenons que les trois principes des juristes du Comité des Trois ne pourraient être regardés comme des vérités intangibles, au-dessus de tout doute. Bien au contraire.

Telles sont les raisons pour lesquelles le Gouvernement hongrois ne peut, à son grand regret, adhérer au rapport du Rapporteur et tout spécialement aux trois principes formulés par les juristes.

Il ne saurait le faire—toujours sous réserve des principes établis dans la première partie de ce Mémoire—qu'au cas où les juristes n'auraient pas continué leurs recherches au delà du préambule de leurs trois principes, qui, ainsi que nous l'avons constaté, reconnaît la possibilité que des mesures qui se présentent sous l'aspect de mesures de réforme agraire, constituent, d'après leur caractère intrinsèque, des mesures prohibées. C'est la reconnaissance de la compétance des Tribunaux arbitraux mixtes. La rechereche des qualités intrinsèques des faits, se présentant sous l'aspect de mesures de réforme agraire, constitute déjà un travail de juge portant sur le fond. Personne n'a le droit de se substituer dans ce travail au juge. Le juge seul peut décider, le texte des Traités en main, quels sont les caractères intrinsèques des mesures prohibées. Il paraît qu'il y en a plusieurs, il paraît qu'ils sont alternatifs; par conséquent, on ne peut en exclure d'avance, pour des considérations politiques, l'un ou l'autre, comme par exemple le

défaut d'indemnité, et faire, par contre, d'autres qui ne sont également que des traits caractéristiques éventuels, des traits caractéristiques indispensables, comme la différentialité et l'intention spéciale de frapper l'ex-ennemi.

Ces problèmes ont été déjà étudiés et décidés par nombre de Tribunaux arbitraux mixtes et par la Cour permanente de Justice internationale elle-même. Il n'appartient pas au Conseil de vouloir forcer la Hongrie à adopter des solutions contraires à celles que dans d'autres cas analogues, juridiquement même identiques, ces hautes instances internationales ont adoptées.

Recommander à l'acceptation des parties des solutions contraires aux solutions admises par les hautes instances internationales qui ont interprêté les Traités, par conséquent des solutions contraires aux Traités eux-mêmes, et les imposer aux Tribunaux mixtes comme leur nouvelle loi, ce serait exiger la modification du Traité de Trianon, en l'espèce, uniquement au désavantage de la Hongrie; ce serait en même temps permettre que le principe de l'indépendance de la magistrature internationale et l'idée de l'arbitrage elle-même fussent sacrifiée à des considérations politiques dont les motifs, l'importance, l'existence même échappent à l'appréciation de la Hongrie.

De l'avis de la Hongrie, même de justes considérations politiques ne sauraient exiger autre chose dans cette affaire que le rétablissement du libre fonctionnement du Tribunal arbitral mixte. Les mêmes considérations politiques ne sauraient exiger que le rétablissement, en même temps, de la foi dans le sérieux de l'arbitrage international, déjà gravement ébranlée depuis neuf mois que dure cet incident, ainsi que le rétablissement de la foi dans le pouvoir de la Société des Nations, employé dans le but des hauts idéals qui lui ont été assignés et pour la réalisation desquels le Conseil, ainsi que tous les membres de la Société ont le devoir de travailler.

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